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THE

LAW MAGAZINE AND REVIEW.

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I.—THE JUDICIAL TREATMENT OF JUVENILE OFFENDERS.

IN prescribing rules for the treatment of juvenile offenders we are beset by two difficulties. If magistrates are given a free hand, they are apt to be unnecessarily severe; if their hands are tied by means of regulations, they are apt to be too lenient. The state of the law prior to the passing of the Children Act 1908, approximated to the former error; since the passing of the statute, it has approximated to the latter. I say "approximated," because there was neither a free hand then, nor is there rigid restriction now, although the condition of matters certainly approached, and at present approaches, to these respective extremes.

The tendency of modern legislation dealing with children is towards leniency. The ideas and methods of lawyers in this respect have undergone a great change. It is hard to realise that quite recently young persons were sentenced to death or to long periods of imprisonment; but, while we recognise a commendable advance, we must be careful, lest, in our desire to be merciful, we are really cruel, and lest we encourage children in evil, by failing to make punishment dreaded. The sanctions of the law must be made effectual in the matter of preventing crime. Fear of consequences is still an important factor in restraining the young from wickedness, and, unless those who hold judicial and

magisterial positions observe a wise discretion, there is a great risk that, under the modern system, the fear of consequences will cease to be operative.

My attention has been drawn to this matter through my duties as public prosecutor in a large district, containing a mixed population. While it is true that the responsibility for dealing with such offenders rests upon the presiding judge, the prosecutor is not thereby relieved from giving the matter anxious consideration, because the judge naturally looks to him for information as to the facts of the case, and is guided to a large extent by his opinion as to the course which is best in the interests of the child and of the public. I have by no means established to my own satisfaction any general principle for dealing with such cases, but I have made a note of some provisional suggestions, which my professional brethren may be pleased to consider. These suggestions can be regarded as a step towards the attainment of uniformity in the treatment of juvenile offenders.

In the first place, let us set down the objects which we seek to attain. Lord Guthrie, in an address on "The Treatment of Criminals," which he delivered to the Scots Law Society in November 1907, pointed out that three leading objects are recognised by the State in dealing with those who infringe its criminal law,—Punishment, Deterrence, and Reform. His Lordship, with much propriety, laid especial stress upon reform. We may accept this classification as a basis for our present purpose, and define the objects sought to be attained in the judicial treatment of juvenile offenders, as—

(1) The reform of the juvenile offender;

(2) The protection of the public, by deterring others from committing similar offences; and

(3) The punishment of the youthful offender for the misconduct of which he or she has been guilty.

This order indicates the relative importance of the several matters.

Having thus defined the end in view, I shall next enumerate the judicial methods prescribed for its attainment, beginning with the mildest, and proceeding to punishments of greater severity. I shall add a few brief notes as to the use of the several methods.

(1) Admonition and dismissal of the charge without recording a conviction; and

(2) Admonition and dismissal of the charge, recording a conviction.

Either of these modes will be used where the offender is of good character, has efficient home training, and is charged with a petty offence. The choice of one or other is regulated by the propriety, in a particular case, of preserving a record of the conviction.

(3) Discharge under recognisance or bond to be of good behaviour, and to appear for conviction and sentence when called on at any time during a specified period not exceeding three years; and

(4) Discharge in a similar manner, but subject to the condition that the offender shall be under the supervision of a probation officer.

These methods are suitable to a charge of a graver nature, where the offender's antecedents are not very bad, and where his parents are fairly respectable. Their respective adoption will depend upon whether the parents can be trusted to look after the offender without supervision.

(5) Committal to the care of a relative or other fit person.

This procedure should be adopted when it is deemed necessary to remove the offender from an objectionable

home, and a suitable person is willing to take charge of him.

(6) Committal to an industrial school.

An order for such committal may be made in the case of a child under 12 years of age (or, in special circumstances, a child of 12 or 13 years), who is charged with a punishable offence. This course may be adopted where a child is either without proper parental control, or has got beyond it, and no relative or fit person will undertake the custody of him.

(7) Committal to a reformatory school.

This is competent in the case of a youthful offender, who is 12 years of age and under 16 years, and who is convicted of an offence punishable with penal servitude or imprisonment. The principle explained in regard to committal to an industrial school applies with equal force to committal to a reformatory. It is a means of removing the child from injurious surroundings.

(8) Private whipping.

This is restricted to boys, and practically to boys under 14. It is a suitable punishment in charges of indecency, malicious mischief, or other offences which ought to be met by corporal punishment.

(9) Fine, damages or costs; and

(10) Ordering a parent or guardian to pay fine, damages or costs.

A youthful offender should not be ordered to pay a fine, damages or costs, unless he has private means or earnings. An order on the parent or guardian is only appropriate where such person has conduced to the commission of the offence by neglecting to exercise due care of the child or young person.

(11) Ordering the parent or guardian of the offender to give security for his or her good behaviour.

This may be done where the child is left in the care of a parent or guardian, and it is desirable to stimulate the latter, by the dread of consequences to himself, to take care that the child does not commit further offences.

(12) Committal to custody in a place of detention provided under the Children Act.

This is suitable for graver offences, for which it is thought proper to impose restraint on the liberty of the offender, and where it is not thought desirable to commit him to a certified school.

(13) Committal to custody in a place of detention directed by the Secretary of State; and

(14) Committal to prison.

These last two methods are to be used only in exceptional cases, where the crime is a grave one or the offender is of very bad character. A child under 14 cannot be imprisoned.

Such being the means provided by the legislature, I shall proceed to explain the provisional suggestions on the subject, which have occurred to me in practice. The notes attached to the preceding statements have to some extent forestalled what has now to be said, but my intention at this stage is to arrange the various modes in a sequence adapted for practical use. It will be understood that I do not pretend that these notes, or the suggestions I am about to make, are in any sense exhaustive or conclusive.

The *criteria* which rule the adoption of particular methods of treatment in individual cases are four:—

(1) The age and sex of the offender;

(2) The gravity of the offence charged;

(3) The antecedents and character of the offender; and

(4) The character of the offender's home surroundings.

I am inclined to attach special importance to the last of these.

Let us take the most favourable case. A boy of respectable character, whose parents are decent folk, has committed a petty offence. In such a case, the parents will voluntarily make good any little damage the boy has done, and he may be discharged with an admonition. In the majority of cases, the charge will be dismissed without recording a conviction. Where the offence is one of dishonesty (a kind of crime which is apt to be repeated), and where there is a suspicion that it may be repeated, the boy should be dismissed with an admonition, but the conviction recorded.

Let us now suppose that the boy is charged with a graver offence, or one aggravated by previous conviction. The protection of the public, and the culprit's welfare, demand severer measures. At this point the character of the home surroundings assumes great importance. If the parents or guardians are respectable, and doing their utmost to keep the boy from bad companions and to bring him up well, he should be left in their charge, but ordered to enter into a recognisance or bond to be of good behaviour for a definite period, and to come up for sentence, if called upon within that time. If the parents are respectable and well-meaning, but careless, the procedure will be stiffened by placing the boy under the supervision of a probation officer, or the father may be ordered to give surety for the boy's good behaviour.

It may be, however, that the home influence is weak, or even that it is prejudicial to the offender, In such circumstances the boy must be removed from his dangerous environment. Various courses are open. If a well-doing relative, or other fit person, comes forward and offers to take care of the boy, the Court may with advantage commit him to the custody of that person. Home training is always better than institutional training. But if home training of this sort cannot be procured, a committal to an industrial school, or to a reformatory school, according to the age

of the offender, is the readiest means of placing him in a more wholesome atmosphere.

Even where the offender and his parents are respectable, it is sometimes necessary to mark the gravity of an offence by imposing a penalty more severe than probation of good conduct. Whipping in such a case is often the most efficient punishment. I have in mind more especially an act of indecency, or wilful mischief, committed by a boy. A boy under fourteen will retain a more decided impression of the wickedness of his conduct, in relation to an offence of that class, if he is well birched.

Fines are not generally applicable to juvenile offenders. If the parent or guardian can be charged with conducing to the commission of the offence, he will be fined; but that is a charge which it is exceedingly difficult to prove, and, in any case, the punishment does not directly affect the child.

Where a temporary removal from home surroundings is desirable, but it is not thought proper to relieve the parents from the duty of watching over their child, the offender may be committed to a place of detention provided under the Children Act. After undergoing what is equivalent to a term of imprisonment, without the stigma of a prison, the young offender will return a wiser child, and his parents will be more sensible of the necessity of looking carefully after him.

Imprisonment in one of His Majesty's prisons, and detention in a place directed by the Secretary of State, are punishments of such an exceptional character, that for my present purpose it is unnecessary to say anything about them. They are intended to be made use of only in the case of felonies, or of very bad children.

There arise occasions where the question of committal to a certified school, whether industrial or reformatory, must be weighed with discretion as against some other form of treatment. If the offender is within a month or

two of attaining the age limit, the opportunity of committing him to a certified school should not be lost, unless the Court is satisfied that there will be no reason afterwards to regret that he had not been so disposed of. At such a crisis, an intimate knowledge of the offender's circumstances and antecedents, is absolutely necessary.

These are my provisional suggestions. They are not intended as general principles, and they are not put forward with any expectation that they will receive general assent; but they may be accepted as a basis for discussion. They indicate the line of procedure, which must be adopted, if we are to endeavour to make sure that juvenile offenders shall not be permitted to grow into hardened criminals, through the failure of our judicial tribunals to use rightly the powers with which they have been vested.

HENRY H. BROWN.

II.—IMPRISONMENT FOR DEBT.

THE Report of a Committee of the House of Commons,[1] appointed "to inquire into the existing law relating to the Imprisonment of Debtors and to report whether any amendments are desirable," has been for some time before the public. The circumstances under which it was adopted are not calculated to increase the weight of its recommendations. At the final meeting of the Committee, twelve Members were present. They were divided six to six; but by a rule which will strike most readers as a strange one, the Chairman of a Committee can only vote when the other members are equally divided. Mr. Pickersgill, the Chairman, therefore, could neither vote for his own report nor against that of Mr. Rendall, and the latter's report was

[1] *Report from the Select Committee on Debtors (Imprisonment).* London: Wyman & Sons. 1909.

consequently adopted by a majority of six to five. Had Mr. Rendall been elected Chairman of the Committee, Mr. Pickersgill's report would have been adopted by the same majority. But the six who voted for the Report write as confidently as if the Committee had been unanimous, and refer to the "manifest and overwhelming advantages of procedure under the Debtors Act," regardless of the fact that a full half of the members of the Committee failed to see what was thus overwhelmingly manifest. "Any one but a fool would see this, but half of this Committee are fools," may be regarded as a free translation of this passage.

It will be seen that the terms of the reference are equally applicable to all three parts of the United Kingdom; and three Irish M.P.'s and one Scotch M.P. were placed on the Committee. It was not, therefore, intended to exclude either Scotland or Ireland from the scope of the inquiry. Each of the three parts of the United Kingdom had moreover its own Debtors Act, though Mr. Rendall and his colleagues seem to have been acquainted with the English one only. This Act was passed in 1869. The Irish Debtors Act followed in 1872, and the Scotch Debtors Act in 1880. All three abolished imprisonment for debt, with certain exceptions. (The allegation that any of them abolished it altogether, and that all subsequent imprisonments have been for contempt of Court, finds no support in the terms of the Acts.) In the English and Irish Acts the exceptions are expressed in the same terms, but are not in reality quite to the same effect. Both Acts except imprisonment under the summary jurisdiction of the justices of the peace, but the English justices had a more extensive jurisdiction than their Irish compeers, and this difference still continues to exist. It is for this reason that there is no imprisonment for non-payment of rates in Ireland, while hundreds if not thousands of Englishmen are imprisoned for this reason every year. The Scotch Debtors Act abolishes imprisonment for debt,

with two exceptions, viz., 1. "Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed," and 2. "Sums decerned" (*i. e.*, decreed) "for aliment." It was the duty of the Committee to examine the working of these three statutes, and report on their relative advantages or disadvantages. And even if the Irish statute were identical in all respects with the English, as the latter has led to a great difference of practice in different County Courts, the usual practice in the Irish County Courts could hardly fail to throw some light on the subject. There is moreover another difference between the two countries which is of some importance. The English and Irish Debtors Acts were both introduced in connection with a Bankruptcy Act, but the English Bankruptcy Act of 1869 was superseded by that of 1883, which introduced changes in the Debtors Act as a consequence, while the Irish Bankruptcy Act of 1872 is still in force, and there are, for example, no administration orders in Ireland. I may add that in Ireland there is an appeal from the County Court to the Assizes, with the result that the County Court judge is not unfrequently reversed. How, then, are Ireland and Scotland dealt with in the Report before us? There is not a single word about Ireland. More than this, the English County Court judges and registrars are referred to as if they were the only judges and registrars concerned in the matter. No Irish statistics are cited. One Irish witness indeed was examined, but he had no special knowledge of the subject, and threw little light on it. The Report makes no allusion to his evidence, and as his name was Duncan M'Gregor, it seems probable that the Rendallites mistook him for a Scotch witness. As to Scotland, they say: "The Committee has examined foreign and Scotch witnesses with a view to comparing their methods for the recovery of civil debts with the English procedure under this Act." The Committee took a very strange view of the

scope of their inquiries if they thought themselves at liberty to ignore Ireland altogether, and to treat Scotland as a foreign country. There would have been no difficulty in obtaining the opinions of the Irish County Court judges on the working of the Act if they had desired it, and though I do not think full Irish statistics are available, those that are published indicate a startling difference in the working of the Debtors Acts in the two countries, the cause of which would have been worth inquiring into. The opinions of three Irish County Court judges will be found in Mr. Collinson's pamphlet on the subject published by the Humanitarian League, which some members of the Committee had probably seen. I quote the following from Judge Orr, who would no doubt have expressed the same sentiments before the Committee if his opinion had been asked: "Strict investigation has convinced me that in almost all the cases that come before me a committal order would simply mean consigning the bread-winner of the family to gaol and the wife and children to the workhouse, and my belief is that in a large number of cases—perhaps the majority—the application is either made to put pressure on the debtor's friends to come forward and pay the debt, or to force people in respectable positions, such as mercantile clerks, school teachers, and the like, to resort to any means to avoid exposure, thus driving them into the clutches of money-lenders. . . . . The majority of debtors do not pay simply because they cannot, and if imprisonment for debt were abolished it might lead to a restriction of credit which would be an advantage." Passing from the opinions of the Irish judges to the Irish statistics, I have not been able to find any which give full details, but the reports of the Irish General Prisons Board contain for each year the number of persons imprisoned as "Debtors and Prisoners under Civil process"—a head much wider than imprisonments under the judgment-summons

process, and including, I believe, imprisonments for contempt of Court. In England the total number of imprisonments of this kind in 1906 was 19,719. In Ireland for the same year it was 75. Is there not something worth inquiring into here? I may add that in Ireland these imprisonments seem to be rapidly increasing, though still greatly below the English level. In 1907 the number was 123, and in 1908 it was 174. The figures for Belfast in the three years were 2, 15, and 38 respectively. The cause of this increase I can only conjecture, but the English total (17,918 for the year 1908) is still more than 100 times as large as the Irish, while the population is scarcely 8 times as large. (The business transacted in the English County Courts seems to be about 11 times that in the Irish.) I find that these prisoners are still classed by the Prisons Board as "unemployed," so that no rules corresponding to those of 1899 seem to have been adopted in Ireland. I am not aware of the Scotch statistics. That further information as to the working of the Scotch Debtors Act could have been easily procured I cannot doubt. One of the three Irish members of the Committee retired during the course of the inquiry, and was succeeded by an English member. The other two were absent when the vote on the Report was taken. It is stated that they were both opposed to it. The solitary Scotch representative voted against it. Mr. Rendall, the author of the Report, in more than one of his questions, described the 12,000 persons imprisoned under the judgment-summons process in England in 1906 as the total number out of a population of 43 or 44 millions. This is the population of the United Kingdom, not that of England and Wales only. The Irish and Scotch were not even worth taking a passing glance at. If there was any difference, either in law or in practice, they were sure to be wrong.

The objections to imprisonment for debt under the existing

law are of two kinds, which I may describe as theoretical and practical. With the former I apprehend the Committee need not have troubled itself. The man in the street, if fairly educated, is as competent to deal with them as it was. Such an objection, for instance, is that cited by Judge Dodd from the Fourth Report of the Common Law Commissioners: "It is not consistent with any just principle of jurisprudence to enforce a mere civil claim by imprisonment." It would have been better if the Committee had abstained altogether from considerations of this kind and dealt with the practical branch of the question only—the advantages and disadvantages resulting from the present law, and the best mode of increasing the former and removing or diminishing the latter. Their dissertation on the necessity and advantage of credit seems to me to be as irrelevant as it is weak. If they had reported that the abolition of imprisonment for debt would destroy credit, this dissertation might have been relevant to the issue; but they seem to admit that this is not the case. If they had even reported that it would put an end to kinds of credit which were beneficial to the public, and which it was desirable to encourage, critics might confine their remarks to the futility of the reasoning. But if credit be a necessity, as they allege, it is clear that no change in the law would put an end to it, while it can hardly be denied that the present credits are often excessive, improvident, and fraught with evil consequences. Indeed, the recommendations of the Committee aim at suppressing many of these credits, which therefore they do not regard as desirable. Where do they show—or even allege—that the abolition of imprisonment for debt would seriously interfere with any credit-giving which is beneficial to the public?

Passing to the practical objections, I find fault not merely with the Report of the Committee but with the whole inquiry. Granted that to go fully into every branch of the subject

would have occupied more time than the Committee could afford, a very considerable proportion of the imprisonments for debt in England have always arisen from other exceptions in the Debtors Act than the judgment-summons process. In 1907 the County Courts did not account for one-half of the entire number, and in the prison census taken in that year by the Home Secretary, out of 800 imprisoned debtors only 248 owed their imprisonment to the County Courts. The evidence as to these imprisonments by other tribunals was very scanty, and almost confined to the city of London, where we might naturally expect to find fewer defects or irregularities than elsewhere. If the Committee had stated that, owing to the scantiness of the evidence, they were not in a position to give any opinion with regard to these imprisonments, it would have been natural enough; but they write, "We find nothing to criticise in the administration of these powers by Courts other than the County Courts. The law, as it is, appears to be useful and salutary, and its administration by judges and magistrates is, we believe, just." *Omne ignotum pro magnifico.* The evidence, published along with the Report, is altogether insufficient to warrant any such conclusion. The counter-report, which had the support of half the members present, finds some faults in the present system, though it also proposed to retain a good many imprisonments under the first five exceptions in the Debtors Act. Had further evidence been taken it is probable that both sections of the Committee might have modified their views—for instance, as regards imprisonment for non-payment of rates or for maintenance of a wife, in which it appeared from a recent case that, under the present law, the unfortunate husband might spend his whole life in prison if the wife lived long enough.

In addition to the very perfunctory treatment of this important branch of the subject, the selection of witnesses as regards the County Courts seems to have been one-sided.

The judges may perhaps be regarded as occupying an impartial position, but this is not true of the registrars; and the non-official witnesses were almost all persons interested in making a good collection of debts. Only one debtor was examined, and he was not a victim of the present system, inasmuch as the attempt to imprison him had failed. It may not have been easy to procure the attendance of working men who had been wrongfully imprisoned, or of neighbours who could speak positively to the facts, but there seems little doubt that a more impartial selection of witnesses would have much strengthened the case on behalf of the debtors.

The Report of the Committee opens with a strange misstatement: "The Committee have devoted by far the largest part of their attention to a consideration of the question of committals under sect. 5 of the Debtors Act 1869. *This jurisdiction is exclusively exercised by the County Court.*" Yet, they tell us towards the end of the Report, "Some 350 summonses are issued annually in the High Court for considerable sums exclusively against debtors who do not belong to the working classes." Were the members who adopted this Report under the impression that these summonses were issued under some other jurisdiction than that conferred by sect. 5 of the Debtors Act? It would almost seem so from the sapient remark which immediately follows. "We believe that the power of the High Court to commit to prison is essential if its orders are to be enforced." But elsewhere they seem to apply similar reasoning to the County Courts. Now the sixth exception to the abolition of imprisonment for debt comprised in the Debtors Act is, "default in payment of sums in respect of which orders are *in this Act* authorised to be made." Repeal these six exceptions and, of course, the orders made in respect of them will cease to be made, and there can be no contempt of Court in not obeying non-

existing orders. If it were thought desirable to retain any of these orders in substance, it would be easy to do so in an altered form so as to prevent their non-fulfilment constituting a contempt of Court—to provide, for instance, that the plaintiff "shall recover" instead of that the defendant "shall pay." The plaintiff would still be entitled to use all the existing means of recovery except imprisonment. No complaints were made that the orders of the Scotch Courts were treated with contempt, although this mode of enforcing them can only be adopted in a few instances. After stating, however, that the judgment-summons process is used only in the County Courts, the Committee publish in an Appendix the Forms of Judgment-Summonses, &c., used by the High Court. Did they read them?

An objection urged against the present law is, that it is class legislation, all the debtors who are imprisoned belonging to the working classes—for, as is stated, a debtor who can raise a few pounds can always avoid imprisonment by becoming bankrupt. The Committee might have been expected to state whether this is so or not, instead of which they simply allege that men belonging to the higher classes have been sued in the County Courts and have paid when threatened with imprisonment. But they do not allege that a single one of these men went to prison. The explanation of their being sued in the County Court is sufficiently obvious. The rules of the High Court as regards costs have led to actions for small sums being brought in the County Courts instead of the High Court, even when the defendant is a millionaire; and a debtor who has some assets (although his liabilities may greatly exceed them), will usually pay a small debt in full rather than take refuge from imprisonment in bankruptcy. Some persons may think that the payments thus obtained are a sufficient set-off for the imprisonment of a number of men who

cannot pay; but what has this to do with the question whether the imprisonments under sect. 5 of the Debtors Act are not in practice confined to the working classes?[1] Moreover, one of the recommendations of the Committee is to abolish imprisonment for debts incurred for luxuries or for money lent. If this amendment were adopted, how many men belonging to the upper classes would be compelled to pay their debts by means of a judgment-summons in a County Court? If the present legislation is not class legislation, would not the proposed amendment render it so?

The difference of practice between different English County Court judges is admitted by the Committee, but the causes of it and the best modes of remedying it have not been fully or satisfactorily investigated. One difference noted by them is, that "some judges insist on legal evidence of means to pay. Others make full use of their liberty to accept evidence 'in such manner as the Court thinks just,' accepting for example certificates as to wages from employers, statements of bailiffs of the Court, evidence not on oath, and other hearsay evidence." They express a decided opinion in favour of the more lax practice. "The judge's discretion," they write, "to hear other than legal evidence is to the advantage, principally of the debtors, but also of the creditors." The ground of this latter assertion seems to be that proof by legal evidence would involve greater expense, which expense would, generally speaking, fall on the debtor; for I presume they did not mean that while it was to the advantage of both parties to be able to tell lies without incurring the penalties of perjury, the debtors were on the whole more successful liars than the creditors. But let us concede the proposition as stated. We do not want to know whether the practice in question is

[1] The counter-report here ran: "Your Committee have received overwhelming and, in fact, practically uncontradicted evidence that it is the working class, and the working class alone, which suffers the penalty of imprisonment for debt." Why did the framers of the successful Report neither admit nor deny this statement?

advantageous to the debtors as a whole or to the creditors as a whole. We want to know whether it is conducive to the public interest—to the cause of justice. If a debtor is wrongfully imprisoned on account of the reception of lax evidence, is it a sufficient answer to say that three debtors who ought to have been imprisoned escaped in consequence of evidence equally untrustworthy? Does the Committee intend to assert that the reception of this kind of evidence is conducive to the ascertainment of the truth? If so, why not admit it in all trials, whether civil or criminal?

The statute requires proof to the satisfaction of the Court of means to pay, present or past, and goes on to say that proof (not "evidence") may be given in such manner as the Court thinks just, and that for this purpose witnesses may be summoned and examined on oath. Clearly what the Legislature intended was that no man should be imprisoned without satisfactory proof of his means to pay; and in defending the existing law it is often urged that no injustice can be done, because satisfactory proof of the debtor's means to pay must be given before the committal order is made. Can such evidence (if that term can be applied to it) as the Committee here mentions afford satisfactory proof of anything? There was hardly a County Court judge examined before the Committee who did not admit that the kind of evidence on which committal orders were often made was of the most unsatisfactory character, and in fact did not amount to proof in the ordinary meaning, much less in the legal meaning, of that term. Why then did not the judges insist on having the satisfactory proof of means to pay which the Legislature apparently intended to require; and why did they accept evidence that they would not listen to in any other case before them? Simply, I apprehend, to prevent the statute from becoming a dead letter—the creditor being seldom in a position to give satisfactory proof of the debtor's means to pay, while even in the

cases where he could do so, the expense of giving strict proof would probably exceed the sum claimed. The wholesale rejection of such applications would moreover discredit the Court as a machinery for collecting small debts—which is usually described as its main object—and would often deprive the registrar of a great part of his emoluments. But there never was a more groundless assumption than that all debtors, honest and dishonest, have a common interest, and that the system which imprisons fewest debtors is best, even though all the imprisonments may be wrongful. It is not in the interests of justice or of the public that any debtor should be imprisoned without clear and cogent evidence as to the grounds for inflicting this punishment.

The great increase in the number of committal warrants is a circumstance which must strike every student of judicial statistics. In 1906 they were almost six times as numerous as in 1870, though the population had not doubled during the interval. The Committee might have been expected to inquire into the causes of this increase and the means by which its further progress might be checked. But the feature which attracts their attention is a less conspicuous and important one—viz., the smaller per-centage of imprisonments compared with warrants of committal. This they ascribe to the greater care which, in their opinion, judges now exercise in granting committal orders. The applications for committal orders having become six times more numerous than they were formerly, and the number heard by the judge on the same day having increased in something like the same proportion, we are asked to believe that the judges now give more time and attention to each individual case than they did formerly, and consequently make fewer erroneous findings as to means to pay. It seems more reasonable to ascribe the change, such as it is, to the practice which was declared legal by the House of Lords in the case of *Stonor* v. *Fowle* in 1886—viz., making a

committal order with a stay on execution so long as the debtor continues to pay certain specified instalments. Before this practice (which seems to be now almost universal) had been adopted, the debtor who was erroneously found to have the means to pay went to prison. Now, in the majority of cases, he acquires the means to pay during the time that execution is stayed, and pays a sum which he had not the means of paying when the committal order was made. But there is not any such steady and continuous decrease in the proportion of imprisonments to committal orders as the Committee alleges. The alleged decrease in comparing 1907 with 1906 is chiefly due to the adoption of a different mode of reckoning debtors who were imprisoned on two or more committal orders running concurrently. The following are the per-centages of imprisonments to committal warrants for the ten years 1899—1908 inclusive, and I think, if we bear in mind the change in the mode of reckoning the number of imprisonments in 1907, which must have produced an apparent reduction of the percentage, the change during this period has been altogether in the opposite direction from that alleged by the Committee. In 1899 the ratio of imprisonments to warrants was 6·46 per cent.; in 1900, 6·12; in 1901, 6·53; in 1902, 6·84; in 1903, 7·24; in 1904, 8·14; in 1905, 7·77; in 1906, 7·84; in 1907, 6·32; and in 1908, 6·58. Are there any other six gentlemen in England who would find in these figures evidence of a continuous decrease in the ratio? As a further specimen of their accuracy as regards statistics, I may mention that they tell us in the body of the Report that the number of imprisonments in 1897 was 9,214, whereas it appears from the Appendix that it was 7,729.

It is not only from statistics, however, that the Committee draws very singular deductions. They contend that the power of imprisonment for debt should be continued because "the confidence between debtor and creditor is the founda-

tion of trade," and if the "sanction" of imprisonment were withdrawn, this confidence might be weakened (whereas I presume it increases as the number of imprisoned debtors increases). It seems, however, to exist between wholesale merchants and retailers without this sanction; nor do I think banks ever imprison those who borrow money from them. But I am afraid that, if the recommendations of this Committee were adopted, the sanction of imprisonment would be withdrawn from at least one-half of the transactions on which committal orders are now made, and the "mutual advantages" which "both the giver and the receiver" derive from these transactions would thus be lost. Where would be the confidence between the money-lender and the borrower, or the purchaser of bad debts, and the man whom he sues, if this sanction did not exist? But one-sided legislation will never produce confidence between the two parties to a transaction.

The Committee justify the continuance of this sanction, however, on the ground that the debtors who are summoned before the County Courts are objectionable persons whose imprisonment would (I infer) be no great harm. They belong, as we are told in the Report,—not as far as I am aware in the evidence,—to three classes: (1) Those who have deceived the creditor by their statements as to their position; (2) Those regarding whom the creditor has been deceived by the statements of others; (3) Those whose character has deteriorated from causes which the Committee proceeds to enumerate. As to the first class, what kind of statements do they refer to? If the debtor exaggerated his means of paying but had sufficient means notwithstanding, how was the creditor damnified by the misrepresentation? While, if his representation that he had means to pay was false, is the judge justified in holding it to have been true, and granting a committal order accordingly? As to the second class, how is the

debtor responsible for false information as to his position given without his knowledge? As to the third class, are not the debtors whose characters have deteriorated owing to unemployment, domestic trouble, or hereditary causes, usually without means to pay? Then are the persons belonging to these three classes so strangely scattered through the country that there may be 1,000 of them in one district and 10 in another district which to ordinary observers seems similar? and do they remove from one place to another according to the views of the judge who presides there for the time being? Nor do I see that there is room for any great difference of practice between different judges if all the debtors who come before them are liars or degenerates, or persons who have induced others to tell lies on their behalf? No judge would be likely to treat them with more favour than he could help.

The Committee also compare the relative advantages or disadvantages of distraining the debtor's goods and imprisoning him. This may not have been irrelevant, as they had to consider what the effects of the abolition of imprisonment for debt would be; but they do not point out that at present these are not alternative remedies, the plaintiff being empowered to use both methods of recovering the same debt. I do not concur with their opinion that the seizure and sale of his goods is harder on the debtor than imprisonment, nor do I think the evidence bears out this conclusion. But having arrived at it, the Committee ought to have carried it out consistently, and proposed to alter the law so as to exclude distraint until an attempt to recover the money by imprisonment had failed. Instead of this, they have expressed their opinion that no alteration should be made in the kinds of imprisonment for debt—for instance, that for non-payment of rates—in which the present law provides that imprisonment is not to be resorted to until an unsuccessful attempt has

been made to levy the amount by distress. The landlord possesses this power of distraining without being required to obtain the sanction of any Court to his use of it, and his claim to distrain takes priority over that of the execution-creditor, yet the Committee makes no proposal to limit this power of distress, while they describe the landlord as one of the creditors who ought to be able to enforce his rights by means of imprisonment when his remedy by distress fails. "Retain imprisonment because it is better than distress, but do not restrict in any way the present powers of distress," is not very consistent advice.

Space will not permit me to go fully into the recommendations of the Committee or to consider the counter-report proposed by Mr. Pickersgill, which has been published along with its successful competitor. My object has been to show that the Report, which certainly does not express the sentiments of a majority of the Committee, is not of sufficient merit to claim acceptance on other grounds. The evidence which has been collected and published is of great value; as also are the statistics given in the Appendix, though I should wish to see them supplemented by further evidence and further statistics, more especially as regards imprisonments by other Courts than the County Courts. Imprisoning a man who cannot pay the rates seems to me to be a peculiarly futile proceeding. In ordinary cases the public bears the cost of trying to screw the money out of a debtor who has not got it, and the creditor can look on placidly with his arms folded; but in imprisonment for non-payment of rates it is the creditor who pays for maintaining the debtor in prison. The ratepayer is the creditor, and the imprisoned debtor is supported out of the rates—his family perhaps being also thrown on the rates during his imprisonment.

I venture to make a further suggestion with regard to these Parliamentary Committees. Many of the most valuable members do not belong to the legal profession, and

would be greatly assisted in their labours if they had before them a succinct statement of what the present law on the subject is (with a reference to the statutes in which it is to be found), and also a reference to the principal statistics available for their guidance. This duty, I think, should devolve upon a public official. It is hardly possible that the Committee on Imprisonment for Debt could have arrived at the Report on which I have been commenting, if such information had been given to it. As it is, the import of some of its most important recommendations is rendered doubtful by its ignorance of the law. The Report recommends that creditors shall not be permitted to obtain committal orders under sect. 5 of the Debtors Act unless the debt was incurred for necessaries or damages for tort: but it also declares that the power of the High Court to commit debtors to prison ought not to be interfered with, and that the law which it administers is "useful and salutary." Did the Committee intend that the restriction on the granting of committal orders based on judgment-summonses should apply to the County Courts only? If so, the creditors who were excluded from obtaining such orders in the County Courts would sue in the High Court and obtain committals there. Sir Wm. Selfe's Bill is, of course, free from this ambiguity. The exclusions contained in it extend to all Courts having jurisdiction under the 5th section of the Debtors Act; but probably the author of the Bill did not regard the administration of that section by the High Court as useful and salutary.

The Committee gave much time and labour to the discharge of its duties, but the least valuable outcome of its labours is the Report; and, I think also, that of the two competing Reports which it considered, its choice fell upon the wrong one.

LEX.

III.—THE LAW OF THE UNIVERSITIES.

IX. MISCELLANEOUS.

(a) *Practice and Evidence.*

WITH regard to procedure in the ordinary courts, the universities and colleges must sue and be sued in their corporate titles, but in the case of a college apparently not during the vacancy of the headship. During such vacancy certain other powers, especially any which need the use of the common seal, are in abeyance, unless the defect be met by the statutes. At Common law a corporation can contract only by deed under the common seal, but in later times the strictness of this rule has been relaxed in the matter of contracts of small amount and of frequent occurrence. There is no doubt that a college through its bursar could make valid contracts for the supply of provisions, the repair of buildings, the hire of servants, and similar matters. As universities and colleges are charities, they fall under the ordinary rule that the administration of them and of any trusts of which they are trustees,[1] being matters of public interest, are to be inquired into by information by the Attorney-General at the relation of any person interested. In one case an information was filed against the Vice-Chancellor, the Warden of New College, for misconduct in his office.[2] The procedure by mandamus is that which most frequently occurs in the reported cases. It lies where jurisdiction has been declined, of which many instances have been given in the previous pages. It may issue to a university, a visitor, or a college according to circumstances.

[1] An early case is *A.-G.* v. *Balliol College* [1744], 9 Mod., 407, with regard to the Snell exhibitions. The person who is to execute a trust must be a person pointed out by the creator of the trust as a proper person to execute it. *Re Crunden & Meux's Contract*, L. R. [1909], 1 Ch., 690.

[2] *R.* v. *Purnell* [1748], 1 W. Bl., 37.

Some of the cases are to restore a graduate deprived of his degrees, to affix the common seal,[1] to grant a degree, to admit or restore a fellow or scholar, to admit a head,[2] in one case to remove a Lollard from a scholarship.[3] The mandamus might have been followed by feigned issue, when that mode of procedure existed.[4] Proceedings by *scire facias* to repeal a charter or letters patent are still competent, but have been superseded by surrender. The Universities Committee of the Privy Council sits by delegation of the Crown in the matter of grants of new charters. Prohibition lies where jurisdiction has been exceeded, as by the Chancellor's court. In one case the right to a fellowship of Winchester was by consent tried by prohibition, it being doubtful who was visitor, and a mandamus thus not lying.[5] In one case a writ of restitution was refused,[6] but no doubt would have been granted in a proper case. Habeas Corpus lies for false imprisonment of a scholar[7] or of one of the public.[8] The remedy by *quo warranto* is not competent to test the right of a fellow to his office.[9] An injunction has been sometimes granted to prevent a college from taking a certain course. At least one famous case was tried on ejectment, and probably the modern action for the recovery of land would lie under similar circumstances. Distress as a remedy for withholding of the stipend of a fellowship is no longer in use. Fellowships are probably since recent changes not freehold offices but merely charges on the

[1] *R.* v. *Cambridge University* [1765], 3 Burr., 1,647.

[2] As in *Patrick's Case* [1666], T. Raym., 101, where it went to the senior fellow of Queens'.

[3] T. Raym., 110. [4] *Sandys* v. *Sandys* [1840], 1 Q. B., 316 (n).

[5] Cited in *R.* v. *Bishop of Ely* [1750], 2 W. Bl., 58. Declaration in prohibition, a procedure occurring in some of the cases, is now obsolete.

[6] *Widdrington's Case* [1663], T. Raym., 31, 68. It is probable that *certiorari* would lie to remove the record from the Chancellor's court, but there appears to be no case on the subject.

[7] T. Raym., 110. [8] *R.* v. *Elsdon*, below. See also *Perrin* v. *West*, above.

[9] *Marriott* v. *Gregory* [1772], Lofft, 21.

revenue of the college. Trespass or case would lie in certain cases. An action of contract would lie under the ordinary rules of contract where a college was a party.[1] If the question as to the sufficient learning of a graduate in holy orders be raised, it must be by *duplex querela* in one of the provincial courts,[2] it cannot be by *quare impedit*, a secular court being, as Lord Ellenborough said, unfitted to sit as a court of error upon matters of grammar.[3]

Several questions of evidence have been decided by the courts, but some would probably not be considered binding at present. Possibly judicial notice of the common seal will be taken since 8 & 9 Vict., c. 113. But it is still necessary to prove, on any objection, that the seal was affixed with proper authority. Two cases of interest arose before the Act, and they may still be useful as guides. Both were actions of slander by Doctors of Medicine of St. Andrews against defendants who had alleged that the plaintiffs were unqualified. In the earlier case the production of the diploma of M.D. from St. Andrews University was held not to be sufficient evidence that the seal affixed was the seal of the university.[4] In the later case the plaintiff produced evidence that the seal was the seal of the university and on that succeeded.[5] In an anonymous case the King's Bench refused to act without an attested copy of the statutes of All Souls, on an application to the visitor to appoint as founder's kin fellow a candidate rejected by the college.[6] It was the practice at King's for the proceedings of the Provost and fellows to be entered in the *Liber Protocollorum* signed by the registrar as a notary public. The

[1] As in *Jones* v. *St. John's College, Oxford*, L. R. [1871], 6 Q. B., 115, a question of counter-signature by the bursar to a building contract.

[2] *Willis* v. *Bishop of Oxford*, above.

[3] *R.* v. *Archbishop of Canterbury* [1812], 15 East, 143.

[4] *Moises* v. *Thornton* [1799], 8 T. R., 303.

[5] *Collins* v. *Carnegie* [1834], 1 A. & E., 695.

[6] *Anon.* [1734], 2 Barnard, 437.

book contained an entry of the expulsion of Mr. Bearblock from his fellowship by decision of the visitor, but the entry was not signed. Evidence was given that the handwriting of the entry was the same as that of the signed entries. The unsigned entry was held to be inadmissible.[1] A testator made a gift of his library to Selwyn. The catalogue was a voluminous document, a copy of which would have entailed considerable expense. Probate was granted without requiring the catalogue to be brought into the registry, the college undertaking to hold it for the registry.[2] Usage will be taken into consideration. So will the manner in which the donor of a trust fund conducted himself in the distribution of a trust fund.[3] Inspection of corporation books will be allowed to an interested party provided that the evidence is required in a civil action,[4] but not in a criminal prosecution.[5] At Oxford statutes of the university are printed or written in duplicate, one copy being deposited in the archives, one in the Bodleian Library, Stat. x, 2, 2. Probably either would be evidence.

(*b*) *Differences between Oxford and Cambridge.*

Several of these have already been noticed, but it may be useful to give a short summary in this place.

(1) A hall is a corporation at Cambridge, but not at Oxford. Trinity Hall is as fully a corporation as Trinity College, and the same was the case with Clare, Pembroke, and St. Catharine's, when they were called halls. Selwyn is technically a hostel and corresponds very nearly to the Oxford private halls, such as Marcon's.

(2) The government and discipline differ both in names and functions. The Oxford names of Congregation (in the

[1] *Fox* v. *Bearblock* [1880], 17 Ch. D., 429.

[2] *In the goods of Balme*, L. R. [1897], P. 261.

[3] *A.-G.* v. *Brasenose College* [1834], 2 C. & F., 295, the case of Nowell, Dean of St. Paul's, and Middleton School; *A.-G. of Ireland* v. *Bishop of Limerick* [1870], 1 R. 5 Eq., 403.

[4] Grant, 311.

[5] *R.* v. *Purnell*, above.

Oxford sense), Delegacy, Board of Faculty, Visitatorial Board, are unknown at Cambridge; Syndicate,[1] Senate, Sex Viri, are equally unknown at Oxford. The rights of jurisdiction over bad characters have had a different growth in the two universities. The powers and tenure of office of the Vice-Chancellor are not the same.

(3) The procedure in the Chancellors' courts are not the same, and the right of conusance is more restricted at Cambridge.

(4) The degrees differ, especially the law degrees. D.C.L. and B.C.L. are peculiar to Oxford; LL.D., LL.M., and LL.B., to Cambridge. A smaller difference is the variety of caps and gowns at Cambridge, which also has no distinctive scholars' gowns, as at Oxford.

(5) The position of both heads and tutors differs considerably in the two universities. Nor has Cambridge gone so far as Oxford in attaching professorships to colleges.

(*c*) *Acts of Parliament affecting Colleges.*

Some of these have already been noticed, but there are many in addition. The Statute, 27 Hen. VIII, c. 42, s. 7, seems to be the earliest. It enacted that Durham College, Oxford (now Trinity), might take the advantage of the Act, which relieved the colleges from the payment of first-fruits and tenths. 18 Eliz., c. 6, contained provisions for leases made by Magdalen and St. John's, Oxford. By 13 Anne, c. 6, canonries were annexed to the headships of Oriel,[2] Pembroke, Oxford, and St. Catharine's, and c. 17 gave to Brasenose the presentation to churches at Stepney. By 3 & 4 Vict., c. 113, the canonry of Worcester was detached

[1] The term "syndic" is adopted from Paris, where there was a *syndicus* or *procurator ad litem*.

[2] The canonry was dissevered from the headship by the Act of 1877, and is now attached to the Oriel Professorship of Exegesis. Canonries attached to professorships also exist at Christ Church, Ely, and Durham.

from the Margaret Professorship of Divinity at Oxford, and the canonry of Christ Church substituted instead. The Cambridge Act of 1856 provided for Trinity scholarships, Grindal fellows and scholars at Pembroke, and similar matters. The Act of 1877 dealt with, *inter alia*, the Snell and Hulme exhibitions and the Dixie foundation at Emmanuel. The Statute, 30 & 31 Vict., c. 76, enabled a new ordinance to be made for Christ Church in substitution for previous ordinances. Hertford, dissolved by 56 Geo. III, c. 136,[1] was reconstituted by the Hertford College Act, 1874 (37 & 38 Vict., c. 55). Private Acts are numerous. Among others may be named 46 Geo. III, c. cxlvii, enabling the Warden of Wadham to marry, 35 & 36 Vict., c. cliv, as to scholarships at St. John's, Oxford, 58 & 59 Vict., c. lxxiv, as to sale of Downing College lands, and 7 Edw. VII, c. cx, as to the Hulme trust estates.

(*d*) *The Undergraduate.*

The college has a discretion as to whom it will admit, and a sentence of rustication or expulsion cannot be appealed against except by those on the foundation, or elected to be on the foundation, who have an appeal to the visitor. In an indictment for assault on a pensioner of Queen's by turning him out of the college garden, the production of a sentence of expulsion by the college was regarded as a conclusive defence.[2] The question that most often arises is that

[1] After it had practically ceased to exist in 1805 owing to the failure of the college to elect new fellows on vacancies. See Co. Litt., 13 b, *Dean of Windsor* v. *Webb* [1614], Godb., 211. Any leases made by the extinct corporation are determined, and where it is a lessee the reversion accelerates and the land reverts to the lessor, *Hastings Corporation* v. *Letton*, L. R. [1908], 1 K. B., 378.

[2] *R.* v. *Grundon* [1775], Cowp., 315. No reasons need be given, but it seems probable that if reasons be given they should be good ones. In *Fitzgerald* v. *Northcote* [1865], 4 F. & F., 656, the plaintiff was expelled from Oscott College for an alleged breach of discipline which the jury found had not occurred, and he obtained damages.

of necessaries supplied to an undergraduate under twenty-one. Necessaries are defined by sect. 2 of the Sale of Goods Act 1893 as "goods suitable to the condition in life of such infant . . . . and to his actual requirements at the time of delivery." This is in accordance with a judgment of the Court of Exchequer, except that the court went further, and held that necessaries supplied to a Cambridge undergraduate are not such things as are requisite for bare subsistence. Jewellery to the value of £8 was allowed.[1] In another case of the same year an action was brought against an Oxford undergraduate for the hire of hunters. The jury found for the livery stable keeper, but the Common Pleas granted a new trial.[2] Dinners supplied to an undergraduate in lodgings are not *primâ facie* necessaries.[3] The latest case on the subject was an action brought by a tailor for goods supplied while the defendant was an undergraduate of Trinity, Cambridge. The bill included eleven fancy waistcoats at £2 : 2s. each. The Court of Appeal held that the onus was on the plaintiff to prove not only that the goods were suitable to the condition in life of the infant, but that he was not sufficiently supplied with goods of that class. Judgment was entered for the defendant.[4] Education is a necessary.[5] This would include matters subsidiary to the main purpose of education, such as books for the schools, payment of battels, rent of lodgings, and drawing the necessary cheques. Where necessaries are bought the infant must, by the section of the Sale of Goods Act already cited, "pay a reasonable price therefor." But he cannot give a

[1] *Peters* v. *Fleming* [1840], 6 M. & W., 42.

[2] *Harrison* v. *Fane* [1840], 1 M. & G., 550.

[3] *Brooker* v. *Scott* [1844], 11 M. & W., 67. Presumably because, if not a non-collegiate student, he would find dinner provided for him in the college hall.

[4] *Nash* v. *Inman*, L. R. [1908], 2 K. B., 1. This is quite in accordance with *Foster* v. *Redgrave*, L. R. [1867], 4 Ex., 35 (n), the case of an Oxford undergraduate and his tailor.

[5] *Pickering* v. *Gunning* [1628], Sir W. Jones, 182; Phillimore, J., in *Collins* v. *Cory*, *The Times*, 5 Feb., 1901.

bill of exchange for them.[1] At Common law a contract by an infant was voidable and might have been repudiated or ratified on the infant coming of age, and 9 Geo. IV, c. 14, enacted that ratification must be in writing. But the whole law was altered by the Infants' Relief Act 1874, since which any contract entered into by an infant (other than for necessaries), shall be absolutely void, and no action lies against him upon ratification made after full age. A contract for payment of a loan made during infancy is also avoided by the Betting and Loans (Infants) Act 1892. For torts the infant is liable. *Ginnett* v. *Whittingham*, above, is good authority for this. There was no doubt as to his liability, the only point was whether conusance lay. But the tort must be independent of contract, and a contractual liability cannot be got rid of by framing the action in tort.[2] The infant may be liable for an independent tortious act which he was expressly forbidden to do by the other party to the contract. In the leading case on the subject an undergraduate of Trinity, Cambridge, hired a horse, the owner expressly stipulating that it should not be used for jumping, and the Trinity man only paid the amount charged for a horse not expected to jump. The defendant lent it to a friend who jumped the horse and staked it. It was held that the defendant was liable. "There has been an actionable wrong," said Erle, C.J., "for which the defendant is liable, independently of the finding of the jury that the hiring of the horse was a necessary suitable to the degree and station in life of this young man."[3] Representation by an infant that he is of age apparently does not allow him afterwards to insist on his absence of capacity to contract.[4] But it seems doubtful whether if he represent

[1] *Re Soltykoff*, L. R. [1891], 1 Q. B., 413.
[2] *Jennings* v. *Rundall* [1799], 8 T. R., 335.
[3] *Burrard* v. *Haggis* [1863], 14 C. B., N. S., 45.
[4] This seems to be the effect of such cases as *Mills* v. *Fox* [1887], 37 Ch. D., 153. At Common law, before the Judicature Acts, there was no liability on such

himself as agent when he is not, he would be liable to an action for breach of warranty of authority, an action of tort. The case might be illustrated by a man under twenty-one opening an account at an Oxford bank and falsely declaring to the manager that he had his father's authority to do so. The father would not be liable on an overdraft. Would the son be, unless indeed the cheques were for necessaries? An undergraduate, besides making himself liable for education, might enter into a valid contract for tuition to others or for the post of assistant-master in a school, if the terms be fair and reasonable and not manifestly to his disadvantage.[1] Protection from betting circulars and similar temptations is afforded to minors by the Betting and Loans (Infants) Act 1892. Under the provisions of this Act the sending of any such circular to any person at any university, college, school, or other place of education, where such person is an infant, is guilty of a misdemeanour, and the sender shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age. There is probably an implied contract that a university or college supplies efficient tuition. An action would lie by an undergraduate—by his next friend should he be an infant—for breach of the contract to educate.[2] A member of a college is bound to conform to reasonable rules of discipline, and if he do not do so, the contract to educate is not broken. In a recent case a Cambridge undergraduate was expelled for refusal to go to chapel. He brought an action for breach of contract to educate. The college set

representation, *Stikeman* v. *Dawson* [1847], 16 L. J., Ch., 205. Roman law allowed liability of the minor where he became *locupletior*, Dig. iv, 3, 1, 13. In *Woolf* v. *Woolf*, L. R. [1899], 1 Ch., 343, an injunction was granted, and the infant had to pay costs.

[1] See cases in Anson, *Law of Contract*, pt. ii, c. iii, s. 2.

[2] This was one of the grounds of action in the well-known Haileybury case, *Hutt* v. *Governors of Haileybury College* [1888], 4 Times L. R., 623, as well as in the following case.

up the Statute of Frauds as a defence to the alleged contract, also that by 56 & 57 Vict., c. 61, s. 1,[1] more than six months had elapsed since the act complained of. On the trial at Herts Assizes, Wills, J., directed judgment for the college on the ground that the relation of an undergraduate to his college was in matters of discipline not a contractual one.[2] Even if over twenty-one years of age the undergraduate has no borough vote for Oxford or Cambridge, whether he reside in college or in lodgings. The only exception is to be found in scholars of Trinity College, Dublin. The undergraduate is liable to the Criminal law like any other subject, the only difference being that in some cases he is amenable to a special tribunal. At the same time he cannot create a crime by persuading a companion of the other sex to walk with him.[3]

JAMES WILLIAMS.

IV.—FORM OF WILL OF AN ALIEN IN FRANCE.

IS the rule *Locus regit actum* as applied to the form of the will of an alien made in France optional or obligatory? A recent decision[4] of the Court of Cassation has made a strenuous attempt to allay the controversy which has been raging around this question for more than half-a-century, aroused, or more accurately speaking, revived and whetted as it was by a previous decision of a section of the same Court of 1853. There is room for hope that

[1] The Public Officers' Protection Act 1893.

[2] *Green* v. *Peterhouse*, *The Times*, 10 Feb., 1896. The contract to educate might also be broken should an undergraduate be expelled or sent down for a definite time without being heard in his defence. Unless indeed it be one of the rules of discipline, as it is in many colleges, that failure to pass university examinations in a given time means withdrawal from the college.

[3] As was held in the famous case of *R.* v. *Hopkins*, already noticed.

[4] Case of *Gesling* v. *Viditz*.

this attempt has been successful. For although there is no theoretical finality about the decisions of this the Supreme Court, in view of the privilege accorded to the lower Courts of France—where case-law is unknown—of disregarding its decisions, nevertheless the circumstances under which the decision in the recent case of *Gesling* v. *Viditz* was rendered entitle it to extreme respect, and it likewise harmonizes, not only with legal and historical precedent, but also with every possible consideration of practical convenience.

The matter is of sufficient importance to warrant brief historical review and comment.

On the 9th March, 1853, then, the Chambre des Requêtes of the Court of Cassation laid down that the principle *Locus regit actum* is universally applicable to wills in common with all other public (*i.e.*, notarial) or private deeds. Thus an alien desiring to make his will in France must, of necessity, adopt one of the forms known to French law, that is to say, must either have recourse to a notary and make a "public" or "mystic" will; or in the alternative adopt the holographic form, that is, write the will throughout, date and sign it with his own hand. In other words, the Court laid down the unmistakable proposition that the local form was obligatory, not optional. The facts upon which the decision was based seem to have been somewhat peculiar, for, as far as can be gathered from the report in Dalloz, the testator's original intention was not to make a will in English form, but to make a French holographic will; this, however, he failed to do, the will not being entirely written by him, and two codicils thereto, although written by him, being dated by someone else.

The practical inconvenience of this decision is quite obvious. Suppose an Englishman or an American in France ill, crippled or infirm to the point of being incapable or unequal to the effort of writing out a lengthy document

in his own hand, while just able to sign his name or make his mark, so that it is impossible for him to execute a valid holographic will, but easy to execute a valid will in the ordinary English or American form. His only alternative is to call in a French notary and execute a French notarial will. This will would be valid as to English personalty under the Wills Act 1861, but might not in the case of a public will (the witnesses to which are hardly subscribing witnesses in the English sense), and in the case of a "mystic" will (where witnesses to the will itself are not necessary), would not pass English freeholds; nor leaseholds (*Pepin* v. *Bruyère*, L. R. [1902], 1 Ch. 24); similarly as to American realty, at all events in the case of an American testator domiciled in one of the States which have derived their legislation from the English Common law.

Query, indeed, whether in such States as have not a statutory provision similar to the English Wills Act of 1861, it would even pass personalty unless the testator were domiciled in France. At best, therefore, the exigency would involve cumbrous and unfamiliar formalities. At worst, the testator would find himself subject to the hardship of being unable to validly dispose of perhaps a considerable portion of his property. Not only is this ruling out of harmony with English and other legislations, but it is also inconsistent with the privilege which a Frenchman has of making his will abroad either in the French or local form at his option.[1]

The same Court has now, in the case of *Gesling* v. *Viditz*, in accordance with the almost unanimous expectation of the judicial world, reversed its former ruling and declared the rule to be optional, not compulsory, in respect of private (*i. e.*, non-notarial) wills at any rate. This decision carries all the more weight in that it was rendered by the Chambre Civile after leave to appeal had been granted by that very

[1] Civil Code, Art. 999.

Chambre des Requêtes which more than fifty years previously had adopted a contrary ruling.

The case in respect of which this point has been pending before the French Courts for fourteen years arose out of the will of an English lady made in English form with two witnesses, but in France. The Civil Tribunal of the Seine, on the 28th June, 1895, held that the rule *Locus regit actum* was not an absolute rule nor a rule of public policy, and that therefore it was optional to the testatrix to adopt the form recognised by the law of her country. This judgment was rendered in defiance of the ruling of the Chambre des Requêtes of 1853, out of that independence of judicial precedent enjoyed by the French Courts already alluded to.[1]

On the 2nd of December, 1898, the Court of Appeal of Paris, which has always held very strongly to the obligatory character of the rule, over-reached itself by deciding that not only was the rule compulsory, but that it must be considered as a rule of public policy. One searches the judgment in vain for any arguments of a convincing character in support of this contention. The Court apparently arrives at its conclusion on the ground that the optional character of the rule, in the case of a Frenchman making his will abroad, is an exception to the general principle which makes the rule compulsory; that exceptions must be strictly interpreted, and that the privilege could not be extended by analogy to foreigners making a will in France; the more so as there is no necessary obligation of reciprocity arising out of the favour thus granted. It will be seen in a moment which of these principles, historically speaking, is the rule and which the exception; meanwhile we are at a loss to connect these arguments with any element of public policy in the ordinary acceptation of the term.[2]

This decision provoked vehement protests amongst commentators and in the judicial world. The case was taken to

[1] *Clunet*, 1895, p. 847. [2] *Ibid.*, 1899, p. 584.

the Court of Cassation, and on the 29th July, 1901, came before that Court. On this occasion, however, the question of the form of the will was not passed upon, the ruling of the Court of Paris on certain other points of more immediate interest being reversed, and a retrial ordered before the Court of Appeal of Orleans. The Court of Orleans, reviewing the whole case, agreed with the Court of Paris as to the invalidity of the will in point of form for non-compliance with the local law. Its judgment is, however, no more lucid than that of the Paris Court, as to the grounds upon which it declares this requirement to be a rule of public policy. It goes as far as to state that it would require no less than a treaty to derogate from the "principle of territoriality" which governs the extrinsic form of written instruments.[1]

Thereupon the executor again appealed to the Court of Cassation, but this time only upon the specific point now under discussion. On the 12th July, 1905, the Chambre des Requêtes placed on record the significant declaration that the appeal was receivable, thus pointing the fulfilment of the expectation that its ruling of 1853 would be reversed; and the case went forward to the Chambre Civile for final hearing. But the Chambre Civile, overloaded as it then was by appeals in actions concerning religious congregations, was unable to entertain the case until the 20th July, 1909.[2]

The Court of Cassation enjoys the advantage of having for its Procureur-Général M. Baudouin, a former distinguished First President of the Civil Tribunal of the Seine. M. Baudouin, when he tackles a subject, invariably goes to the bottom of things, and it must fairly be admitted that he has exhausted the theme in his able argument on this occasion. The matter is fraught, not only with considerable importance for Englishmen who make their wills in France, but also with some little historical interest which justifies a very brief analysis of M. Baudouin's "conclusions."

[1] *Clunet*, 1904, p. 680. [2] *Ibid.*, 1909, p. 1097.

Historically speaking, M. Baudouin points out that the question is one of long standing and was a familiar one under the *ancien régime* in the conflict between the customs of the various French provinces. The question then arose as to whether a testator domiciled in one province and finding himself when he made his will in another, should make that will in accordance with the law of his domicil or the law of the place where he happens to be. It is brought out very clearly that the fundamental principle governing such circumstances directs that the will must be made either according to the custom of the domicil of the testator or that of the situation of the property, if immovable property were concerned. So far, therefore, from the maxim *Locus regit actum* being a primordial principle, as the Courts of Appeal of Paris and Orleans would have us believe, it was not even an exception: it was at this stage non-existent.

This condition of things, even under the *ancien régime*, was found, as might have been anticipated, excessively inconvenient; consequently, as the Procureur-Général pointed out, reason and equity demanded that a stranger, finding himself out of his own province, far from his interests and his landed property, who fell ill, for example, and desired to make his will, should be permitted to have recourse to the custom of the province or district where he was. And so this came to be permitted. But inasmuch as in the large majority of cases he would be bound to address himself to a public officer or notary of the locality, the origin of the obligatory character of the local form became obvious, because these officers had very rarely any actual knowledge, and never any official cognizance, of any law other than that of their own province, and consequently were bound to follow their own forms. The case is quite different when wills made in private form are contemplated. In such cases there is no obligation imposed, either on the testator who draws his will, nor on a public officer who

does not intervene, to conform to local requirements. The natural principle is quite the contrary; namely, that the individual remains subject to his national law, or to the law of the situation in case of immovables. He is, as pithily expressed, "*son propre ministre:*" a notary unto himself.

The apparent exception contemplating the rule *Locus regit actum* as a measure of favour, and optional, is therefore not an exception, but a return to the general principle; and many authors are cited in support of this view.

Practical inconvenience to the contrary notwithstanding, the obligatory character of the rule appears to have triumphed under the *ancien régime*, and it was advocated by many celebrated jurists, notably Pothier and Merlin. Nevertheless, its unworkable character was recognised long before the days of the Code, and it is noteworthy that English refugees in France, after the Rebellion of 1688, were allowed to make wills in English form, and such wills were regarded in France as valid. Instructions to this effect were given by Louis XIV in 1704, and similar instructions were renewed in 1741.

During the preparation of the Code Napoléon the Government draft contained the following paragraph:—

> "*La forme des actes est réglée par les lois du lieu dans lequel ils sont faits ou passés,*"

but in the final text this paragraph does not appear. It must not be concluded from this, as the judgments of the Courts of Appeal in *Gesling* v. *Viditz* erroneously hold, that this paragraph was suppressed because it simply formulated a principle so universal and self-evident that it would have been mere surplusage to enunciate it in the Code. On the contrary, it is evident that the real reason why it was expunged from the draft is precisely because its too stringent application would have brought about the very inconveniences and hardships to which we have alluded.

Portalis himself, in his "*exposé des motifs*" of the preliminary title, says as follows:—

> "*De nos jours, les communications commerciales et industrielles entre les peuples sont multipliées et rapides: il a paru nécessaire de rassurer le commerce en lui garantissant la validité des actes dans lesquels on s'était conformé aux formes reçues dans les divers pays où ces actes pouvaient être faits ou passés.*"

So much for the historical side of the matter.

For the rest Procureur-Général Baudouin makes short work of the alleged argument of public policy. How, he says, can public security, tranquillity or morals, be in the slightest degree affected by an Englishman in France preferring to make his will according to the forms of his national law rather than according to the forms of French law, especially when in doing so he does not call in the services of any French public officer? How can a will so drawn be more dangerous to public policy in France than a simple French holographic will? The suggestion is ludicrous. And with this he closes an extremely able and exhaustive argument studded, needless to say, with quotations and references in abundance.

His conclusions were adopted by the Court, which, while adhering strictly to the general principle that the extrinsic form of written instruments is governed by the laws of the country where they are executed, a principle which applies to wills in common with other instruments, held nevertheless that this is a rule which is optional merely in so far as private wills are concerned, that is to say, wills which do not require the intervention of a notary or other public officer. Consequently a will executed by an English lady in English form, neither written nor dated in her hand, but signed by her in the presence of two witnesses, was valid.

Prior to this decision, an Englishman making his will in France in English form was sure that such will would be regarded as valid in England; but he could not be sure that a French Court would regard it as such if its validity came to be tested therein.

Henceforward, this doubt is removed, and a French Court—for it is fully anticipated that even the refractory Courts of Appeal will graciously accept so well-considered a judgment—will recognise as valid the will made by an alien in France, in accordance with his national law.

OLIVER E. BODINGTON.

V.—THE BAR IN AUSTRIA-HUNGARY.

AMONGST the reasons which make singularly interesting the consideration of the Constitution and the Practice of the orders of advocates, both in the Empire of Austria and in the Kingdom of Hungary, are the strange circumstances of the Dual Kingdoms. Their place in history, their present inter-relations, or their international position, each constitutes a special reason for the inter-relations of the Bars in the two countries. It was to some extent these matters, both of retrospect and of forecast, which made the Conference of the International Law Association, which met at Buda-Pesth under the Presidency of Sir Walter Phillimore, in 1908, a landmark in the interchange of international courtesies. Perhaps the key-note to any discussion on the Bars in Austro-Hungary will be found most clearly struck in the contribution to that Conference of Professor Dr. F. Nagy: "There are no common Austro-Hungarian courts of law but separate Hungarian and separate Austrian ones; there are no common administrative authorities of any grade, but separate Hungarian administrative authorities subordinate to the supreme control of the Hungarian Ministry."

Dealing first with the History of the Bars, and in the first place with that of Hungary, the following salient points may be set forth:—It is difficult to realise that when the Festival of the Millennium was held in Hungary, in 1896, that country had existed as a continuous independent political entity for one thousand years, although the conversion and crowning of Stephen, and hence the actual foundation of the kingdom did not take place till the year 1000 A.D.

After the actual creation of the Kingdom of Hungary, under its first Apostolic king, when advocates appear to have been more in the nature of Court officials than representatives of litigants, there seems no authentic record of the existence of an order of advocates until the beginning of the 13th century. There is preserved in the library of the University at Buda-Pesth a document dated in the year 1206, from which it appears that the Abbots of Pannonhalom and Topolya were summoned to appear before the Holy Roman Court on a certain named day: "*Ut per se vel per procuratores idoneos ad totam causam sufficienter instructos.*" We have been unable to trace the nature of the dispute or the event of the suit, but it may be presumed that by this time fit advocates, sufficiently instructed in relation to the whole of any litigated matter, were not unaccustomed to be heard by the Court of the Holy Roman Empire. The following speaks for itself:—

"*Nos Capitulum, &c., significamus universis, quorum interest, praesentium per tenorem, quod N. N. N. N. nobiles ad nostram personaliter accedentes praesentiam, proposuerunt viva voce, quod in causis suis universis et articulis earundem per ipsos quoscunque, vel per alias quoscunque contra ipsos in quibuscunque Octavis, Quindennis et terminis a dato praesentium per anni circulum in praesentia Dni. Regis vel Indicis curiae ejusdem aut coram Regni Palatino et generaliter coram quovis Indice Ecclesiastico et Tasculari motis vel movendis, tam in agendo, quam defendendo et respondendo fecissent, et constituissent, coram nobis fecerunt, ordinaverunt et constituerunt Magistrum*

N. N. praesentium exhibitorem suum verum et legitimum Procuratorem, ratum, gratum, atque firmum se promittentes habitorus quid—quid in ipsis causis suis per eundem in quoscunque debito termino suarum causarum, actum et gestum fuerit vel ordinatum. Datum, etc."

The next collection which may be studied with advantage by the student in the history of avocature in Hungary is the "Ars Notorialis," which saw the light in the 14th century. It contains forms for very many different kinds of legal transactions and proceedings, and, amongst other things, contains rules for the retainer and practice of advocates.

The following is an example of what may be termed the General Retainer of an advocate in the time of Lewis the Great, *circa* 1308:—

"*Nos Capitulum, etc., significamus universis, quorum interest praesentium per tenorem memoriae commendantes. Quod N. N. Aulae Regiae Miles et Magister Pincernarum ejusdem Dni. Regis nostri ad nostram personaliter accedendo praesentiam proposuit viva voce, quod causas suas adversus quospiam in praesentia Domini nostri Regis, vel Indicis Curiae suae, vel coram tali Indice, in talibus Octavis, vel talibus Quindennis jam motas vel movendas, tam in agendo, quam in defendendo in respondendo commisit coram nobis Comiti N. N. officiali suo de tali praesentium exhibitori finaliter et in solidum procurandas et exequendas—ratum, gratum et firmum se promittens habiturum, etc., etc.*"

Perhaps for the purpose of ascertaining the methods of the selection of the advocate, his functions, the limits of his advocacy, and the matters litigated before the Courts in which he was engaged, the following document will throw as much light on the subject as any other which can be produced:—

"*In Nomine Domini, Amen. Anno Dei, 1308. Ind^e VI, tempore Dni. Clem. P. P. V. Pontif. sui anno IV die 6 mensis decembris, Venerabilis Pater D. Petrus quinque ecclesiensis Episcopus confisus de sagacitate et experientia discreti viri Magistri Angeli de S. Victoria*

eundem Magistrum Angelum praesentem et mandatum hoc sponte suscipientem, fecit, constituit et ordinavit suum verum et legitimum procuratorem et nuntium specialem in causa seu causis, quam et quas habet et habiturus est cum Mag. Nicolao quinque ecclesiensi Cantore, et qualibet alia persona coram Rev. Patre et D. Presbitero Card. Apost. sedis legato ceu Curiae judicibus—tam in agendo quam defendendo, daus et concedeus eidem in procuratori plenam et liberam potestatem agendi et defendendi, libellum, seu libellos et quascunque petitiones dandi, et recipiendi, litem contestandi juramentum calumniae, et de veritate dicendi, et si opus fuerit adversae parti deferendi, terminum ac dilationes petendi, exceptiones proponendi sestes et instrumenta producendi, alterius partis iura revidendi, suspectos vandi, Indices et notarios eligendi et recusandi, sententiam audiendi, et apellandi, apellationes prosequendi, beneficium restitutionis in integrum, et absolutiones toties quoties opus fuerit implorandi, alium procuratorem loco sui constituendi, etc., etc."

The advocate held a licence to practice. The *Judex Curiae Regis* could issue this licence, or as we should say could call him to practice at the Bar of the particular Court. The same privilege was exercised by the *Palatinus* or Judge of the Palatine Court for practice within his Court. Even the *Comes* (or Lieutenant of the County as we should say) could issue a licence to an advocate to plead in the local court. Equally, in the borough or town, the judicial authority for the municipality (who would be analogous to our recorder) could grant such a certificate for practice in that municipality. In fine, it may be said, so far as can be stated broadly after such research as the writer has been able to pursue, that it would be difficult to find any court which was then constituted in Hungary (including such ecclesiastical courts as those of chapters of monasteries and of convents) which could not issue a licence to an advocate to practice before the court granting the licence. But it must be remembered that each licence was issued in the name of the king.

Several things will be obvious from this statement:—(1) There was at that time no distinct order of advocates

throughout the kingdom; (2) there was scarcely a group, even in a particular locality, occupied with advocacy as a distinct vocation; and (3) there was only to a very small degree any recognised system of legal training. The advocate was not even a person of assured professional training and standing, such as the "*notarii publici*," who always formed a distinct class. The "*procuratores*" were merely certain persons authorised generally, or in particular cases chosen by nobles, institutions or citizens, to represent them before particular tribunals, and receiving either general or particular licences for practice before the particular courts granting the licences. It was customary in Hungary, as in other European countries at that period, to employ for purposes of advocature persons ecclesiastical.

The 15th century saw the advocates forming, first in regard to particular tribunals, and then in regard to particular localities, distinct orders, and from this time forward the Bars can be said to have had corporate existence.

About this time grew up the practice of forcing the advocate to take the "*juramentum calumniæ*." This was the oath that the advocate would conduct the case without disloyalty to his client, and in particular that he would not act in collusion with the adversary. It must not in any way be supposed that these provisions were peculiar to the Kingdom of Hungary, as traces of similar precautions will be found in regard to every order of advocates throughout the mediæval world, and have their modern exemplar in the oath which is still in some shape taken in every State of the United States of America.

There were very severe penalties for the punishment of erring advocates by the old laws of Hungary. If an advocate played his client false he was punished as a common cheat; if he left his client unprotected, to the disadvantage of his client, he was stamped with infamy; even if he addressed the Court with irrelevance or at excessive length after

being thereto admonished, he was treated as being guilty of contempt of Court and was amerced or imprisoned accordingly.

One great controversy of those times was as to the right of audience being extended to foreigners. The Law 41, of the year 1569, in terms forbad them. "*Quia non sunt adstricti juramento juxta formulam jure nostro civili praescriptam.*"

We have said that the history of advocates in Hungary is very largely associated with the general history of the country. We find about this time that the evil effects upon the social system of the country, by reason of the protracted wars with the Turks (when Hungary was in effect for centuries the shield of Christendom), had its indirect effect upon the professional classes, which became to some extent disorganised. Amongst other charges against the advocates of that day which aroused popular resentment will be found that of deliberately protracting law-suits. In fact for something like half-a-century the reputation and standing of the orders of advocates was at the lowest possible point. There were even proposals to exclude advocates altogether from intervention in law-suits. How far this temporary discontent was local to Hungary it is difficult to gauge with accuracy. It will be recalled that, in England, in the sixth year of Henry IV., a temporary movement enabled the exclusion of lawyers from the "Unlearned Parliament." However that may be, in the year 1486 there were passed several important restrictions upon the practice of advocates in Hungary. By a royal proclamation it was enjoined that no one should be simultaneously advocate and witness, or advocate or judge in the same law-suit. The advocates were put under the disciplinary jurisdiction of the Courts themselves.

Section 69 of the 6th *decrete* of the year 1486, is especially interesting as a mediæval attempt in the direction of a

"Right-to-work" enactment. It forbids an advocate to accept the conduct of law-suits from more than fourteen persons at the same time.

The Statute 52 of the year 1550, and 49 of the year 1563, is as follows:—

"*Prorelationibus procuratorum quo ad trinaviam prohibitionem responsionum suarum et deliberationum, otiosis item eorum disputationibus et exceptionibus circa indebitam actionem et citationem formari solitis (retensa usque ad reformationem et editionem novi decreti antiqua consuetudine) limites ponuntur.*"

The Law 49, of the year 1563, speaks bitterly "*de otiosis procuratorum disputationibus.*"

Up to the year 1563 procuracies or retainers had been drawn up under ecclesiastical sanction. By the Law 53 of that year retainers to advocates were permitted to be given in the presence of a civil magistrate.

In the year 1567 the oath of the advocates was made more stringent. In addition to the obligation to the client of fidelity in the conduct of the suit, there was a prohibition in favour of the State against the advocate undertaking an unjust law-suit (Statute 27). Many of the difficulties under which the orders of advocates suffered at this time were naturally attributed by the Hungarians to the incursion into their ranks of foreigners, by reason of the domination of the House of Austria. It will be remarked that throughout this period the Hungarian advocates were ceaselessly engaged in fighting for the national party in the national assemblies against the Imperial power.

Amongst the statutes specifically regulating the profession during this period may be mentioned that of 1578 (Statute 17), which limited the period of a retainer to one year, except only when the client giving it remained abroad for a longer period; and that of 1622 (Statutes 14 and 15), arising from the period of war and consequent insecurity (when documents connected with law-suits were taken from

the Courts and placed in what was termed safe, or private, custody) directing that all documents connected with law-suits, and in the possession of advocates, must be returned to their legal owners.

There was in 1695 a royal decree that the regulation of advocates should be strictly observed; that those advocates who did not take the prescribed oath should not be permitted to act, and that law-suits instituted or conducted by such non-juring advocates should be abated or even rejected. It is to be noted that the oath was to be taken according to Catholic rites. In effect it was intended to exclude from the roll of advocates the adherents of the Protestant faith. There was later on added a clause which has a political rather than an ecclesiastical object. An advocate has to swear allegiance to the king; a provision which was intended to break up the relations between Hungarian advocates and the Constitutional and National parties.

Certain new regulations were made in the year 1723. The principal points covered by these were:—

(1) The obligation on the advocate after passing an examination to take an oath that wittingly he would accept no unjust cause; that against the due course of the law no one he would defend; that law-suits he would not willingly protract; and that by no secret bargain he would defeat the rights of his client.

(2) That the advocate would avoid the raising of unfounded objections in the course of the prosecution of the suit.

(3) To use only a limited number of documents (confined to three) in the interest of his client. This strange provision was no doubt merely a check upon prolix pleading.

(4) A prohibition on the stipulation for the payment to the advocate of a part of the subject-matter of the suit.

(5) That the judge might fix the remuneration of the

advocate, having regard to the experience and knowledge of the advocate and the labour involved in the particular business.

(6) That the retainer was valid for the period of the law-suit.

(7) That although it was possible that an advocate might revoke his declaration on admission, such revocation was punishable with a fine.

In the year 1790 new regulations were issued:—

(1) University studies were enjoined; persons of good character alone were eligible for admission; an examination was obligatory in all branches of the science of the law.

(2) Then the student should undergo a term of one year's apprenticeship ("Patvarista") either with a judicial magistrate or with a senior advocate.

(3) Thereafter the student should undergo a term of one year's employment as a junior official in one of the Royal Courts of Justice.

(4) Thereupon the student should pass a special examination held before a commission of examiners appointed by what in England might be termed the King's Bench Division.

It was further provided that an advocate who should behave in a scandalous way, or who should be immersed in debt, or who should be convicted of any misdemeanour, should be punished by admonition, by suspension, or by condemnation to perpetual silence. There were special rescripts and regulations for the counsellors of the King, for the counsellors of the Counties or Cities, for the counsellors in the Holy Roman Court, for the advocates of the Poor, for the advocates of the State. It was after this that the practice grew up (analogous to that in England in Elizabethan times), for persons of the more favoured classes to pass the examination prescribed for an advocate, as a standard of education and a mark of training. In the early years of the 19th century many advocates were to be found who later devoted themselves to the academic study

of law, and to this is due a very remarkable series of important contributions to Hungarian juridical science.

During the 19th century the following may be taken as the land-marks of the progress of the profession:—

(1) In 1827 the system of retainers was reformed. The advocate could be formally retained, either by an oral declaration before the person trying the particular cause, or by a document subscribed before the Tzolgabiró, a headman of a district, a functionary very akin to the Scotch Procurator-Fiscal.

(2) In 1840, special courts were instituted dealing with commercial suits, *e.g.*, bills of exchange, and within those courts it was prescribed that only those advocates who had passed a special examination were eligible to practise.

(3) After 1848 the Austrian rule became all powerful. During the next few years the Hungarian laws were abrogated. An imperial decree established the new regulations for the Bar known as the Sixty-three Sections. The most remarkable provisions were: (*a*) The advocate had to prepare a special statement of facts which, under a penalty, had to be disclosed to the court on the request of the judge; (*b*) the advocate had no right to refuse a retainer on any ground personal to himself; (*c*) the advocate could not put an end to the retainer save on good and sufficient reason assigned; (*d*) any agreement in advance as to fixing a fee was void—the remuneration of the advocate being assessed by the judge, having regard to the labour, the ability and the diligence of the advocate on the one hand, and the financial ability of the parties on the other; (*e*) the advocate was obliged, without reward, to represent the poor.

(4) About the year 1860, the movement for Hungarian Constitution becoming stronger, came the turn of the tide for Hungarian susceptibilities. Hungarian again became the language of the courts of law. The ancient rules of the advocates were restored. The standard of education

and the requirements of training were, however, much relaxed, in order to enable foreign advocates to be replaced by natives of the country. The result was a very abnormal increase in the number of advocates.

(5) In the year 1874 two important statutes were passed. The one (Statute 35) instituted public notaries as a distinct body; the other (Statute 34) revised the rules of the advocates. These laws, though from time to time the subject of some criticism, exist to-day.

Two main features undoubtedly distinguish in history the Bar in Hungary. First, the early date at which the complete status of the advocate was evolved. To cite one final proof that the advocate was no mere procurator, may be instanced the record of the judgment of a cause tried in 1280 A.D., before Comes Petrus Judex Curiæ, where the advocate is mentioned as appearing together with the parties "*juxta quos astitit*," and the parties are mentioned "*personaliter astantes.*" Secondly, the extraordinary struggle which has been made throughout the centuries by the order of advocates for the recognition of Hungarian national rights.

It cannot be said that the Bar in Austria has had anything like the continuity of history of that of Hungary. In order to trace its record during the time prior to the commencement of the 19th century, it would be necessary to review first its relations with the legal system of Germany, with which it was always closely associated, and then its relations with the Bar in Hungary, with which it was always in more or less hostility. As an independent order of advocates, or even as a series of independent orders, it can scarcely be said to have existed before the reconstitution of the European systems after the wars of the French Revolution.

Even after the commencement of the 19th century until the Law of 6th July, 1868, it cannot be said to have been

a free profession. The advocates were practically the nominees of the government, and were thus in effect State officials. Since that regulation of 1868, and to a large extent thereby, the profession has become free, subject to limits which we shall presently indicate, upon entrance thereto and practice therein. Projects from time to time are, however, still put forward, and there may be said to be a certain tendency of opinion in the direction towards a *numerus clausus* or defined number of advocates. In fact, in 1895, a definite proposal to that effect was made at a conference of advocates on the proposition of the delegates of several of the orders. It was not thereby intended that the nomination or limitation should be the privilege of a minister of State, but that the advocates should be received into a limited circle by virtue of seniority. It must not be supposed that this project has no analogue in our own country, as it would really be in some aspects an extension of the rule which in some courts in England has obtained, and which to some extent still in England obtains. It is merely the restriction of a considerable part of the business amongst certain sections according to the decision of the ruling body. The votes of the largest of the bodies of advocates, those of Vienna and Prague for example, were cast against this scheme, and it was rejected on a division. The view in especial of the chamber at Vienna was that any such restriction would tend towards the re-imposition of the ancient system of State nomination, and would even ultimately go far to destroy the independence of the order itself.

In Austria the Bar has all the functions of the legal profession. There exists no distinction between persons exercising the duties of (to translate into English equivalents) advocates, solicitors or attorneys. In other words, there is fusion. Every advocate in Austria can appear and plead before every Austrian Court, it does not matter where

or of what scope of jurisdiction. It has been proposed to separate the profession into two branches: (A) the advocates, and (B) the *avocat-anwälte*, or, as we should say, the solicitors. These proposals have, however, as yet found little favour in the profession. On the other hand, the rule is stringent that advocates cannot exercise any incompatible functions, such for example as a paid office of State, or again, the business of a notary, and notably, any occupation tending to destroy or affect the dignity of the order. On this last point the committee of each of the orders of advocates has full powers to deal with any questionable practice. The business of a stockbroker, for instance, would be held to be inconsistent, or again, that of a commercial agent or banker, but of course there is held to be no objection to a member of an order of advocates acting in such a capacity as a director of a joint stock company.

A subject which provokes a constant stream of criticism in Austria appears to be the fashion in which the magistracy is recruited. There exists no rule by which a previous career as an advocate is, as in England, an essential qualification. On the other hand, there seems to be no bar, such as exists in Germany, to the selection of an advocate for appointment as a judge. Another subject of frequent and animated discussion appears to be whether the fees of advocates should be fixed as in Germany; and so far as can be externally judged it appears that the trend of opinion is in this direction. There has been a movement on foot, largely favoured amongst the members of the Austrian Bar, to form special courts for dealing with questions involving Private International law, a subject which, far more than with us, bulks in importance.

Several voluntary institutions exist for the promotion of the interests and of the confraternity of the profession side by side with the institutions of official recognition.

There have been from time to time conferences of the

whole Bar, uniting representatives from every province within the Empire. No less than ten, culminating in that of 1896, have taken place, each one taking into consideration on the one side questions of public juridical value, on the other, questions of importance to the interests of the profession of the advocate. A permanent executive body has been called into existence for the purpose of relegating these general conferences of the Bar. Amongst the matters discussed have been the unification of the fees of advocates consequent upon the new code of civil procedure brought into existence in 1898.

In the larger towns, and in particular Vienna, Prague, and Brunn, organisations of a more social character flourish, and naturally there, in such large centres, are students' societies devoted to forensic discussion.

At Vienna there exists (that peculiar feature of Continental Bar organisations which has no analogue in connection with the Bar of England) an institution for the free defence of the poor. In addition, it may be noted by the way, according to the law of Austria, that every accused person arraigned before a jury, and even in many parts before inferior tribunals, is entitled to be assisted by an assigned advocate. In civil matters, in every case where the presence of an advocate is requisite, one is officially assigned.

It is now proposed to briefly sketch the course of professional education to which members of the Bar are subject in Austria. Each advocate is expected to have completed a university course, or at least—having passed the matriculation examination, principally directed to Latin, Greek, and German, and general literary studies—to have studied, for a considerable period at an Austrian University, law and political science. The sequence of the legal studies can be classified as follows:—For the preliminary course, Roman law, Canon law, German law and Austrian history; for the second course, Austrian Private law, Commercial law,

and Civil and Criminal Procedure; for the third course, General and Austrian Public law, General and Austrian Administrative law, Political Economy, and the Theory of Legislation. In addition, a law student is expected to go through a course of Philosophy, of Legal History, and of Comparative Statistics. It is a not uncommon thing for the student also to go through a course of Forensic Medicine.

After having finished these courses of legal study, the candidate for the avocature proceeds to the seven years of practical study which are outlined above. In the course of the first four years of his apprenticeship he should take his degree of Doctor of Laws, which is only granted after three severe examinations (termed, not inaptly, "*Rigorosen*"), which are held by the university professors upon the subjects of the three courses to which reference has been made. In the last three years of his apprenticeship he has to pass the Final Examination, held by a board of examiners composed of magistrates and advocates, upon all the branches of Civil and Criminal law.

Regarding the position of the student of law in relation to preparation for the profession and actual practice, it appears to be as follows: He attends the court from his first year. Courts for forensic practice in the nature of Moots have been in recent times organised. The most part of his period of apprenticeship the student passes in the chamber of a fully-qualified advocate as what is termed "*advocatur concipient.*" In this position he works under the direction of his chief and can represent him in court in cases which do not demand the actual presence of the advocate. After the student has passed his final examination he can on his own account, even before the termination of his seven years of probation, appear as an advocate before certain of the inferior courts.

It may be roughly stated that the actual number of advocates throughout Austria is about 1,500, distributed

as nearly as possible as follows: at Vienna about 890, at Prague about 325, at Lemberg about 135, at Brunn about 90, and at Gratz about 60.

The constitution of the Bar is regulated in the main by the regulations of the advocates formulated in 1868, and the Statute of Discipline of 1872. There exists in addition a series of rules for the administration of the orders of advocates, which may be described as internal or domestic in their scope.

The profession is a free one in the sense that advocates are not the nominees of administrative authorities. So long as there is a compliance with the conditions which are presently set forth there is no barrier to enrolment on the List of Advocates. These conditions are that the advocate (*a*) must be domiciled in some locality of Austria: (*b*) that he should be in full enjoyment of civil rights: (*c*) that he shall have completed his juridical and forensic course of study, and shall have passed certain stringent examinations entitling him to the degree of Doctor of Law at some Austrian University: (*d*) that he shall have been engaged in the actual exercise of the profession for at least seven years, of which at least one should be spent in attendance at a Court, and at least three, subsequently to the attainment of his doctorate, with an advocate; the other three years can be spent optionally in either capacity: (*e*) that he shall have passed the prescribed Bar examination. The nature of the course of study has been already indicated in a brief summary.

The exercise of the profession of the advocate is subject to the control of the profession itself. There are distinct orders of advocates, one for each province. In some provinces there are more than one, for instance in Galicia there are four, in the Tyrol three, and in Dalmatia again three; these latter provinces being of a somewhat considerable extent.

The organised institutions of each of these distinct orders may be grouped under three heads, the General Council of the particular Bar, the Committee having executive functions, and the Council of Discipline. The functions of the General Council comprise the selection of its President and of the members of its committee. The Executive Committee settles the list of advocates and of candidates for the avocature, decide upon questions of enrolment, concerns itself with the general administration of the order, gives its opinion on all questions relating to the remuneration of advocates, settles any disputes which may arise between members of the order, appoints advocates for the poor, and generally watches over the honour and the advancement of the interests of the profession without prejudice to the special functions of the Council of Discipline.

The Council of Discipline regulates the receipts and expenditure of the order, fixes and collects the subscriptions of members, discusses matters of professional etiquette, puts forward and criticises prospects of legal reform and for the better administration of justice. It is further charged with the decision of specific questions which may constitute ground for complaint against any advocate or candidates for the avocature in relation to their professional duties. The proceedings are naturally private. There is an "*avocat de chambre*," to whom or to whose deputies is assigned the bringing forward of any matter of complaint.

The decisions of the Council of Discipline can be made the subject of review by anyone against whom any charge is launched or by the *avocat de chambre*, or where the specific professional duties brought under survey are matters of public interest by the Procureur-General, and thus appeal is brought before the Senate of the Supreme Court. The penalties capable of being inflicted are a reprimand, a fine up to 300 francs, the suspension of the offender for a term not exceeding one year, and in case of a most serious

dereliction, erasement from the Roll of Advocates. The expelled advocate can, after the lapse of three years, ask to be reinstated, but naturally this grace is rarely granted.

Since the publication of the Rules of the Bar in 1868, there appear to be few books devoted to the consideration of the profession in Austria. The principal appears to be the *Advocatur und Anwaltschaft* (F. Prischl).

In the foregoing remarks I have largely availed myself of the authority and of the assistance of Dr. Hendrik Marton, of Buda-Pesth, and I desire also to express my indebtedness for much of the information regarding the practice and position of the Bar in Austria to a most lucid memorandum furnished in the year 1897 to the International Congress of Advocates at Brussels by the Committee of the Chamber of Advocates in Vienna. To those sources are due whatever of value there may be in this review. The defects incident to the attempted statement in a brief space of professional systems not without their complexity to a foreign student are my own.

EDWD. S. COX-SINCLAIR.

VI.—COPYRIGHT.

AN article appeared recently in this Magazine written by a contributor, who is evidently a convinced and faithful follower of Mr. T. E. Scrutton, on the subject of copyright. In the course of it the policy of the Copyright statutes was warmly defended. It may be that a contrary view is little likely to find acceptance at a moment when the tendency appears to be to establish and encourage monopoly on all hands. Nevertheless, it is a view which it is not safe to neglect, or to dismiss with an airy wave of the hand as an exploded superstition.

Copyright was unknown to the ancients. Copyright was

unknown to the mediævalists. Copyright is unknown to the Orient. When Job piously wished that his enemy had written a book, we may be sure that piratical designs were not in his thoughts. When Columba copied the Finnians' Psalter at the Irish monastery, he had no consciousness of sin. And though King Diarmid, on the picturesque ground that "to every cow belongs its calf," made an order absolute commanding the delivery up of the copy, the result was only a fierce war.[1] The idea is a modern flower of progress. There is no authority for it in the Corpus Juris. The Harvard antiquary can find no support for it by whatever search of barbarian *kjökken-möddings*. May it not possibly be an ephemeral growth, corresponding to no real need, and stifling real activities?

See where the rampant idea of monopoly is likely to take us. It began its career with a modest attempt to prevent the reproduction in print of an author's *ipsissima verba*. It has led, in the fulness of time, to *Tate* v. *Fullbrook* ([1908], 1 K. B. 821), in which it was gravely argued that because one man had put together a ludicrous series of incidents with connecting dialogue about a motor-car, no one else was at liberty to imitate him.

This was exactly the *reductio ad absurdum* which was put as a preposterous case in 1774, when Sir John Dalrymple said in argument that "Foote's or any other person's puppet-show continued his before public representation, but after that anyone might imitate it."

True, the billows of the sweeping tide were checked in *Tate's Case*. The Court of Appeal provided a rock of refuge. But the waves are beating hard upon it. In *Scholz* v. *Amasis, Ltd.* (*Times*, 19 May, 1909), we find Jelf, J., holding that a very different dramatic piece was an infringement of a play which had a similar setting and story, and which the alleged infringers had, in fact, had in their

[1] The whole legend is denied by most of Columba's modern biographers.

hands. Although the Court of Appeal reversed his judgment, the Lord Chief Justice suggests that similarity in the principal characters might be an infringement. The next step, apparently, will be to restrain street boys from whistling Wagner.

How did the idea which has reached such disquieting proportions arise? When did it become the mode to speak of imitations as theft? A contemporary of Quin's once went about the town distressfully complaining that an energetic rival manager—"has stolen my thunder." He had purposed to electrify London with a stage storm. There, at the outset of the history, we find the notion in its most advanced development. The mere appropriation of an idea, is complained of as robbery. The ancients, we are told, were concerned rather with plagiarism than with copyright. Obvious reproduction discredited an author's reputation; it was foolish, but not dishonest. The more copies that were made of Maro or of Mævius, the better Mævius or Maro was pleased. Their only objection arose when they were not given the credit of the verses. The modern view that one is stealing from a man when one repeats his ideas clearly arose with the commercialization of art. The Renaissance and Reformation necessitated the adoption of commercial standards, a low basis on which all the world might agree. The convenience of the commercial standard was such that it spread to art: a result which has nearly ended in abolishing art altogether. Artists and authors found their soul in their pockets, and banded accusations of "theft" against each other when they touched that sacred receptacle. It is not easy to imagine Shakespeare charging for the Sonnets: it is difficult to imagine Milton declining to make a bargain for *Paradise*. It became possible, and therefore necessary, to live of the gospel of art and letters; and the public was little likely to provide a livelihood by voluntary contributions. So arose the

clamour for copyright: and it had, no doubt, a powerful ally and exemplar in the existing patent law. The patent law, nevertheless, was limited to the purely mechanical concern of manufacture; you could not patent Euclid or St. John.

Still, the new race of authors desired a patent. But commercialism in art is a monster—a chimera whose wailings of emptiness were long in making themselves heard in the grand inquest of the realm. It was not until 1709 that it obtained a fourteen-year power of obstruction. Earlier authors had been content with small gains—they knew that "the price of their work was immortality and that posterity would pay it." And when, in 1774, a perpetuity in copyright was claimed, Lord Camden carried the Lords with him in the noble speech in which the passage occurs: "This perpetuity now contended for is as odious and as selfish as any other; it deserves as much reprobation, and will become as intolerable. Knowledge and science are not things to be bound in such cobweb chains; when once the bird's out of the cage, *volat irrevocabile:* Ireland, Scotland, America, will afford her shelter."[1] Mr. Scrutton, in an unnecessary gibe at Camden, suggests that "if applied to the remuneration of my Lord Camden's own intellectual labour, his lordship might have considered immortality an unrealisable commodity for the wants of daily life." Camden's reputation as a statesman and a patriot is above cheap detraction of that sort.

Sugden (Lord St. Leonards), who was as considerable an author as Lord Camden, and whose works probably paid him much better, declared himself entirely against

[1] It is interesting to notice that two dukes were for and two against Camden, eleven earls for and two against, three viscounts to two, three barons to two, and the Bishops of S. Asaph, Lichfield and Coventry (? Carlisle, who spoke in that sense) to the Archbishop of Canterbury and the Bishop of Chester. Lord Rockingham voted in the minority. The Court of Session came to a similar decision in Scotland by ten to one.

copyright. Speaking on Talfourd's bill, he declared his intention of opposing it at every stage. "He was one of those who thought that there was no Common-law copyright in the author beyond the manuscript when it was written, or while it remained in his own possession. He had come to this determination after much consideration, and he thought that the case was clearly distinguishable from a patent right. He would oppose the bill as long as he could, because he believed that it ought not to be passed."[1] Lord John (Earl) Russell felt apprehensive that when the expectations of authors and publishers were satisfied there would be "no small neglect of the interests of the public." Royalists might have bought up Milton's copyrights and suppressed his voice. Sir Alexander Boswell might have suppressed the *Life of Johnson* for the credit of the family. It is not without interest to note that the strongest opposition was offered to the present Act by Dr. Wakley, M.P., the founder and editor of the *Lancet*, of whom it has been observed by E. Irving Carlyle that "time has proved his contentions in every instance of importance to be just."

The new monopoly had its origin in religious prejudice. One Bell, in 1646, "at great cost and pains," discovered a MS. of Luther's *Table Talk*, and the House of Commons presented him with the sole right of printing it for fourteen years, "and that none should print the same unless licensed by him."[2] Obviously this was a Puritan honorarium to Bell, awarded on religious considerations, as an inexpensive prize for good conduct.

The whole argument in its favour, as a general principle, appears to be based on that most fruitful source of error—a misleading and absurdly sentimental analogy. Once style a composition "property," and the whole train of ideas

[1] 43 Hansard, 555.
[2] *Journ. H. of C.*, 24 Febr. 1646, cited *Paterson, Liberty of the Press and Speech*, p. 243 n.

involved in property law follows. Copying is "theft"; innocent infringement is visited with the consequences of conversion; a man thinks at his peril. A composition is utterly unlike a physical thing, and those simple rights over physical things which are termed property. Absolute exclusive ownership of a physical thing is a conception which it is easy to enforce by law. It is quite clear what the thing is, and what is its history. It is a matter capable of proof by simple evidence, whether Jones made it or Brown. But an idea may occur to a dozen different people. Is the world to be deprived of it for fifty-seven years because Brown thought of it first? You may not take Brown's chair, because he cannot conveniently share it with you. Two people cannot use the same houseful of furniture, except under peculiar conditions. But any quantity of people can share and utilise the same idea, and to prevent them from doing so is simply to stifle development. There is one hideous vice—garbling—against which an author has every right to be protected, as against every libel. More he cannot require.

Except in the case of the reproduction of the *ipsissima verba* of a book, there is a further breakdown in the analogy with property. It is impossible to do more than guess that the supposed infringement is not the independent and original discovery of the second author. And if it be his independent and original thought, on what principle of justice can he be penalized for publishing it to the world—on the footing, forsooth, that he is "stealing" it from someone who has entered it at Stationers' Hall? If it is indeed the latter's "property," you must pay for the use of it, whether you knew it to be his property or not. For example, if *Amasis* was an infringement of *A Son of the Sun*, it was equally an infringement whether the author of the former had read the latter or not. Every one who brought out an Egyptian play on the usual lines of Egyptian plays, must,

on this showing, have been running a grave risk, and we advise Mr. Brieux and Sir H. Tree to be careful. But every one can see that it was really because the authors of *Amasis* had had *A Son of the Sun* before them, that they were held liable, and that their actual misdeed was not the infringement of copyright, but the supposed annexation of an idea.

This consideration only applies to the alarming and illegitimate extensions of the principle of copyright to cover the appropriation of "stage thunder." In its least objectionable form, the prevention of the exact reproduction of literary or artistic matter as published, copyright nevertheless, remains open to the charge of stifling the development of culture. An artist is perfectly at liberty to keep his creations to himself. But when he gives them to the world, he cannot behave as if they remained his own. They have become part of the common stock of thought, and an attempt to embarrass the free use of them can only produce friction and explosion.

He is only the channel through which they come. The impulse to spread their benefits, an act which does not in itself do him the slightest harm, is and must be the paramount duty of those who become acquainted with them. They are the natural heritage of the distraught world; to make money of them is blackmail. To sell or exhibit them for money is not blamable, though it may not be magnificent: *il faut vivre.* But to expect to control their reproduction, sale or exhibition, for a long series of years, is simply to claim to put fetters on human development.

The author might have refrained from making his message known. Morally, we may blame him or not, as we feel inclined. Legally, we cannot touch him. But he is not at liberty to make it known and then to control its working in the world. When he has given it out, it has passed from his hands. It has, to employ the jargon of sciolists, ceased to be his "property." It is the "property"

of humanity and he cannot control its destinies further. He has led them to the knowledge of their own, and they cannot in the long run be fettered in the use and enjoyment of it. He may charge a pilotage fee, but he cannot fairly assume to license pilots.

A new idea is like a new continent. The first discoverer, and any parliamentary Pope Alexander who favours him, can only appropriate so much of it as he can occupy. He cannot exclude the rest of the world and force them to pay tribute to him. Land and goods are limited, and the maximum of convenience is subserved by the concession of a share to individuals, to be utilised as their own particular sphere. But no necessity dictates the reservation and the fencing round of private preserves in the domain of thought. The realms of gold are ampler than the kingdoms of clay. There is room for all in those astral regions.

Writers of eminence have claimed and conceded as much. Swift never cared about his copyrights.[1] Macaulay and Grote opposed Talfourd's Act. When some captious critic told Molière that parts of his plays were "lifted" from another author—"C'est mon bien," declared the great dramatist, "je le prends là ou je le trouve." It would be impossible to put more neatly the cardinal truth that literary compositions are the "property," not of the author, but of those who can use them. In the same spirit Poe observes lightly of a plagiarist,—"the little man is quite welcome to take away on his back as much as he can carry." It is surprising that Carlyle did not agree with them. One of the foremost supporters of Talfourd's Bill, and a petitioner *in propria persona* in favour of it, he could nevertheless write loftily of "peddling away one's poor gift in Review articles for a discerning public that has sixpence to spare!"

Händel, at any rate, picked up his property where he met

[1] *Paterson*, *u.s.* 244 n.

with it. The perpetual discussion of whether or not Händel was a plagiarist is really a very empty one. It is quite clear that in composing his later works, Händel availed himself of solid sections of his own and other people's previous effusions, whenever he felt that they supplied exactly what was wanted. And where was the harm? In Japan, the ethics of authorship do not exclude the artistic use of other men's labours. The Japanese author and the Saxon composer look only to the interests of art. They work in the material ready to their hand; and they leave the result to be judged as a whole. These considerations, though they excuse the plagiarist of genius, are not precisely applicable, one must admit, to the wholesale infringer of copyright. The principle, however, is the same.

The artist who increases the world's culture by the production of works involving the judicious use of the work of others—and what artist does more?—differs only in degree and in motive from the retailer who increases it by reproducing and thus spreading more widely that work. Is there any moral inherent right in an author to dam the fountain of which he has unsealed the spring? Those who ascribe the whole value of his work to his labour, and on that ground demand a perpetual copyright[1] for him are deceived by a fatuous parallel and commit an unmistakeable blunder. The raw material of his work is the thought and culture of mankind. He cannot, by some occult *specificatio*, appropriate it to himself. Paterson's facile proof that copyright is property runs as follows:—"The author of a writing has a specific property, for if he finds that the diffusion of many copies ministers to the objects of life and procures him profit [or reputation] *then* the power of multiplying copies is substantially a property in itself." Exactly so one might argue, that if a robber baron finds that it pays him to obstruct a pass, "*then* that power of letting travellers go through is substantially a property."

[1] Cf. *Paterson, u.s.* 246.

If an author's right is indeed so conclusive as loose thinkers represent, it is curious that the lending of books and pictures is not made an infringement. Not because of the difficulty of enforcing such a law, we may be sure. Libraries and water companies have been in the habit of enforcing such restrictions with some success. And yet, for one author who risks reprinting, there are a hundred who risk loan. Probably the reason is, that an average amount of lending is included in the economic price of a book, and that if lending were prohibited, the price of books must fall. There would be less demand for a book which could not be safely lent or left about. It would be too much, even for sentimentalists who weep over the poor author's poorer family, to insist that everybody who reads his language shall have to pay for it. And yet, an unlimited power of lending is really tantamount to a power of reproduction. Let Messrs. Mudie look to it!

At any rate the existence of an unrestricted power of reading, lending and discussing his work, shows plainly that the so-called "property" of the author, assumed so often to be axiomatic, is a pure arbitrary hypothesis. It is a convenient way to secure his livelihood, to invest him with the power of levying blackmail in this particular, arbitrarily chosen, way. There is no magic in reprinting, that the right to prevent that particular form of spreading his thoughts should be "property" by every rule of propriety and right feeling, whilst no other method is anyway blamable. But this conclusion leaves us with the problem—How is an author to be remunerated? His extortions must go: but is he to be left with nothing?

There are roughly two kinds of authorship. There is the industry which collects and classifies facts: such as is exerted in the compilation of a directory. There is the less mechanical variety which we term literary. The first is exactly on a level with news. Great exertions and expense may go to the publication of news items. Yet nobody

disputes that the bare facts, when published, are not copyright. And, for all that, curiously enough immense pains and thought are devoted to obtaining them by every competing newspaper, though they can be copied (though not textually) an hour after. There must be remuneration somewhere. The labour of producing a directory seems to rest on the same footing. The compiler has the benefit of the first impression, and of being first in the field. It is an immense advantage over all competitors. In point of fact, it is enormously difficult to prove infringement in such a work. The only practical method is to show that mistakes have been copied, and the difficulty of finding one's own mistakes, which presumably have been as far as possible corrected, is great. On the whole, there seems little ground to believe that these useful works of mechanical industry would bring less profit to their compilers if everyone were as free to make use of them in theory as they are in fact. The most powerful deterrent to piracy is that there is not room for two editions; and the original has the advantage. Capital may be needed to defeat competition: but so it is to carry through a suit for infringement.

Then with regard to that branch of authorship, which demands special qualifications. Is it likely that the few people who, in these days, find literature a paying profession, would have their gifts unremunerated if copyright ceased to exist? Is it, in actual fact, our experience that, proportionately to population, more and better works are published than in the age of Dryden?—or than in the age of Bacon? or that authors, as a class, are better off? One person is much better off—the publisher. With a free press, a published book which succeeds obtains an instantaneous free advertisement for the author, in the shape of pirated reprints. His reputation is raised over a far-extended area. It may be asked, what use any amount of reputation will be to the author, if the only use he can make of it is to write

more books for the profit of pirates. The answer is, that a brilliant reputation is the passport to success. There is no limit to the uses that can be made of it.

As soon as Queen Anne's Copyright Act, imperfect as it was, was passed, the Grub Street hacks began to appear—the hangers-on of literature, who, now that literature had a cash value, were content to claim the odd half-pence. The broker in the new market began to flourish, as brokers in all markets do. Literature was turned into a trade. The foundations were laid of the structure of which the finial is the railway bookstall.

Lord Camden, after all, was right. Love must not be sold for gold, lamentable as may be the case of those who have plenty to spare of the first and less than enough of the second. Literature must not be a matter of the mart, sad as it may be when poverty prevents a genius from speaking. And, indeed, it is probable that the author's gains would be but little diminished. The world has a certain amount of money to spare for authors. Whatever channels this is artificially directed into, the total cannot be much increased.[1] The true problem is to ascertain how it is to be divided. What is the bearing of copyright upon this enigma? We may take it as axiomatic that no one can make a living out of literature without first making a name. Copyright or no copyright, an aspirant must either impress a publisher or spend a considerable amount of money in putting his unknown work before the public. In these days, criticism is discounted: what is wanted is advertisement. This must always be expensive, and more and more so as time goes on. The cruder methods of advertisement are constantly replaced by more subtle ones, which run through more refined media and demand a more costly sustenance. Copyright or no copyright, the budding

[1] J. Hume opposed Talfourd's Bill. "He would vote against the Bill on every stage; for, whilst it would only do good to one in 500, it would do great injustice to the other 499."

author must find a patron or a bank-balance: even if the patron takes the form of a newspaper editor.

It is, therefore, the author of established position who is affected by the existence of copyright. And if it is true that the world has a certain amount to spare for books, this fund will be divided among authors of established position in exactly the same way, in the long run, whether copyright exists or not. The brokerage which the existence of copyright implies is simply a charge on the fund.

Some slight stimulus might, indeed, be given to the work of less-known authors, if copyright were abolished. For the best-known writers would be the only ones likely to be reprinted, and the work of an unknown writer would have a chance of escaping undue celebrity. But this can scarcely be counted a drawback. The argument was used as a weapon *against* copyright, by Sir John Dalrymple, in *Donaldson* v. *Beckett* (1774).[1]

If copyright, saving existing interests, were done away with to-morrow, would Mr. Hall Caine and Mr. Silas Hocking cease to write? Concede that the market value of their work is reduced to *nil*—which is far too large an assumption. The public wants their work—in some form or another, it is very certain that it will get it. The public wants its favourite to write: he will not publish at rubbish prices to meet piratical competition. Some means out of the deadlock will inevitably be discovered. Water finds its level. Though it may no longer seem to possess a market value, the work of the author will possess an intrinsic value. He must lose, certainly, the sum which at present he, or more probably his publisher, charges in virtue of his feudal-baron's castle of privilege, for liberty to use the common highway of thought when it passes through his domains. That would not involve any material deduction from his profits, and certainly none from his legitimate profits. It

[1] 17 Parl. Hist. 962 (an *ex parte* report).

is not necessary to show exactly how the result would be achieved. But, clearly, the piratical firms would find their occupation gone. The public would by no means be content with reprints of standard works. There would be money in novelty, and few things are more certain than that the publishing trade would put their heads together and agree on some cartel to maintain prices.

Take as an illustration the steamer traffic on the Clyde. It is perfectly open to anybody to run steamboats from pier to pier; and in fact there were some thirty private owners, each with a vessel or two, half-a-century ago. The railway companies, with their powerful resources, have, as a matter of fact, made private ownerships impossible, except in the case of the West Highland line, of which its Clyde traffic is only a branch, and in that of a single private firm. A new "pirate"—for so I suppose the red-hot advocates of copyright would desire me to style an owner who should take it into his head to imitate the idea of running steamers on an occupied route—would speedily be run off the station, *unless* (and this is a vital consideration) he could claim a generous and loyal support from the public. A vital consideration, this, because it may be asked what use the opening of traffic to free competition is, if it is practically useless owing to cartels and rings. It enables competition to succeed in the hundredth case: the case where it can appeal to sound sentiment.

Maintain copyright, and the fetters on thought are of iron. Abolish it, and they become elastic. The author gets no less remuneration, but the way lies open to reproduce his work freely, and in the rare cases when that is needed in the public interest, it is a road that can be followed.

There is no need (keeping to our nautical metaphor) to anticipate the advent of a swarm of craft flying the skull and cross-bones. But the amateur crew who wish to row

from one landing to another will not find their way barred by an interdict; and the enterprising skipper who sees a chance of meeting a felt want will be able to appeal to public generosity not to see him beaten off by the rings. Copyright, in short, is a belated survival from the days of State regulation of thought and industry. Juster views of economics recognise that only illegitimate interests can suffer by the removal of artificial restraints. At a moment when a Government returned to maintain freedom of trade is engaged in administering and justifying a highly provocative measure of protection—the new Patents Act—and when its antagonists are at length found unanimous on the blessings of State-fettered commerce, it may be unlikely that this truth will find acceptance. But such vagaries are the backwater eddies of the current of enlightenment. They cannot permanently prevail over the logic of experience and common sense.

T. BATY.

VII.—PROGRESS OF THE GAME LAWS.

WE suppose that few of the many magistrates, who daily administer the law under the Game Act of 1831, realise, to the full, how vast were the changes wrought by that great measure of reform. The proposals embodied in this statute had been before the country for some years, and the most strenuous efforts had been exerted to defeat or delay the projected legislation. How it was regarded by politicians of the type of the first Duke of Wellington may be gathered from the fact that they described it as "revolutionary." Red ruin, they declared, would follow, and the breaking up of laws; while an inevitable consequence would be the disappearance of game, and, worst of all, the disappearance of the country gentleman. Happily their forebodings have been falsified, the country gentleman is still

with us. "Partridges and pheasants," said Sidney Smith, "though they furnish nine-tenths of human motives, still leave a small residue which may be classed under some other head."

The direct consequences of the laws then existing were serious enough. The justices of Norfolk, in Quarter Sessions assembled—a tribunal never suspected, we believe, of any undue sympathy with poachers—were led to deplore the "injurious operation" of statutes under which imprisonment had increased "to an alarming and unprecedented extent." It is curious to reflect that, within the memory of men still living, it was unlawful to buy or sell a single head of game in any circumstances whatsoever—all commerce in game being interdicted under pain of heavy penalties. Not only did there exist this absolute prohibition against any traffic therein, but the men entitled to kill or pursue game were very few in numbers. Lawyers, well versed in the lore concerning the comparative merits and conflicting claims of the long-bow and hawk, as against the musket and fowling-piece, have, indeed, doubted whether for two centuries before 1832 *anyone* was entitled, in point of law, to *shoot* a pheasant, a partridge, or a hare. However this may be, it is certain that the qualification necessary to enable a man to kill game was possessed by very few. Unless he chanced to be the owner of some chase or warren, or were the son and heir apparent of an esquire or person of superior degree, the fortunate sportsman must needs possess a qualification *in land*, to wit, an estate of £100 a year, or a life estate or leasehold for ninety-nine years of £150 per annum—"fifty times the property," says Blackstone, "is required to enable a man to kill a partridge as to vote for a knight of the shire." Neither rank nor wealth could, in itself, confer the coveted privilege—

"A Doctor of Divinity," explained Mr. Secretary Peel, in the House of Commons, "does not possess the privilege of killing game. He may, indeed,

procreate a qualified person, but he himself is not a qualified person. The eldest son of an esquire or person of higher degree is a qualified person, and, as a Doctor of Divinity is a person of higher degree than an esquire, he may beget a qualified man, but he has not himself the privilege of killing game . . . . The second son of a man of £20,000 a year is not by law qualified to kill game: the younger children of a man possessing the largest property in the kingdom, are not qualified by law to kill game on their fathers' estates."

On a property of less than £100 a year, it would often happen that no one had the right of sporting: if the owner himself were seen shooting, an information might be laid against him by any man; while, although, in Blackstone's phrase, the game laws had raised a "little Nimrod" in every manor, the lord of the manor might be "warned off" as a trespasser by the owner of the soil. A tenant farmer with a thousand acres dare not kill a hare in his cornfields even with his landlord's express permission.

As may well be supposed, such laws as these were set at naught by poachers, peers, and plutocrats alike. The younger son of a duke was not content to play the humble rôle of "beater"; nor would the "Jos. Sedleys" of the day be denied their pheasants in due season. "Do the country gentlemen really imagine," asked Sydney Smith, "that it is in the power of human laws to deprive the three per cents. of their pheasants?"

The land was thronged with poachers—hundreds of respectable innkeepers and poulterers were in direct communication with them—coachmen and guards, and even lords of the manor, received their share of the spoil; while Lord Suffield relates that two or three peers were more than suspected of taking part in the illegal traffic. A Bow Street officer informed a Parliamentary Committee that he knew a place where "the whole of the village were poachers, including the constable." At a time when it was a crime either to buy game or to sell it, the London poulterers disposed of it in huge quantities—live birds were sent up to them as well as dead, eggs as well as birds. The

price of hares was from 3*s.* to 5*s.* 6*d.*; of partridges, from 1*s.* 6*d.* to 2*s.* 6*d.*; of pheasants, from 5*s.* to 5*s.* 6*d.* each, but sometimes as low as 1*s.* 6*d.* Partridges were at times retailed at 1*s.* each; and a London salesman was once seen to throw 2,000 into the Thames for want of a market. The poacher could not, of course, regulate the supply in accordance with the demand. A poulterer who did a "limited trade," supplying private families only, told the Parliamentary Committee that about 10,000 head had been sent to him during the year. Customers for poultry would, he declared, most certainly have left his shop had he failed to secure a regular supply of game. When, in 1818, the Act was passed which made it illegal to *buy* game, it fell a dead letter. The chief clerk of Bow Street informed the Committee that he could not remember a single conviction under the Act, and stated that during the last year there had not been any conviction either for buying game or for selling it. "It is a most absurd and ridiculous tyranny," wrote the *Edinburgh Review*, "to prevent one man who has more game than he wants from exchanging it with another man who has more money than he wants."

A remedy was loudly demanded by the country gentry who, after the manner of their kind, called for legislation of a "more drastic" character, coupled with a more rigid enforcement of the existing laws. Night poachers were, accordingly, transported for seven, or even ten years. The result, of course, was that a spirit of fierce resistance was aroused, and more game was sold than ever had been sold before. "Poachers," continued the *Edinburgh Review*, "will not submit to be sent to Botany Bay without a battle." Men, who would have yielded readily to a superior force of gamekeepers, with the prospect of some three months in Norwich Gaol, fought like demons to escape transportation. They fired at the keepers, and battered them with the butt-ends of their guns. A body of poachers actually set guards round

a house in the neighbourhood of Doncaster during the time necessary for scouring the plantations; while, at Lord Cholmondeley's, members of the gang knocked at the hall door and challenged the domestic garrison. The keepers were armed with pikes, guns, and cutlasses, but their opponents often mustered in bodies of fifty strong, and desperate encounters ensued. Many were killed on both sides, but public opinion ran high, and it frequently happened that the keepers could not, or would not, identify their assailants. Yet it was estimated that one-fourth of all the commitments in Great Britain were for offences against the game laws.

Great changes were introduced by the Act of 1831. Justices were empowered to grant licences entitling the holders to buy game and dispose of it in their shops, while any person who wished to sport was enabled to take out a game certificate, the equivalent of our modern licence to kill game. Several of the then existing restrictions as to the time and mode of pursuit were re-enacted and additional ones created. Considerable criticism was evoked by the terms of sect. 36, which gave the landowner and his servants a right to demand and, if need be, take by force *any* game in the poacher's possession which appeared to have been recently killed. This provision was censured as dangerous, impracticable and unjust; but it was said, with much show of reason, that the time had come to deal a blow at the title by "occupancy," under which qualified sportsmen, who raised a covey in one man's field and slaughtered it in his neighbour's, claimed the birds, and left the freeholders to the remedy, too often a nugatory one, by way of action for the trespass. This claim was rested on a decision of Chief Justice Holt, alleged to be deduced from the Year Books, declaring that a wild animal is the property of the lord of the soil whilst it remains there (except where a man has a chase or free warren), but the property goes with the hunter as soon as he drives it

off the land where he started it. The law (said Mr. Oke) seems to treat the claims of the landowners as extinguishing each other, and confers on the person who first captures it the *property* in the animal captured, whether he be a poacher or trespasser or not.

Blackstone, if we remember aright, maintained that the Common law of England vested the sole property of all the game in the king alone, and would have none of the doctrine which based the title on "occupancy," as of things which were and still remain in common:—"fair game" for all comers, as the saying goes. The true view would seem to be that there is a right of private property in game, *ratione soli*. Rejecting alike claims of "prerogative" and theories of "occupancy," we may recognise a qualified property in game, dependent upon and evidenced by its connection with the soil—a property contemporary with the continuance of game upon the land.

An interesting illustration of the peculiar situation, which resulted from the laws in force a century ago, is afforded by a quaint circular issued by the Duke of Devonshire in 1797:—

"HIS GRACE the Duke of Devonshire from his munificent Disposition has resolved to devote certain MOORS for Grouse Shooting to Gentlemen resident in the neighbourhood thereof on applying to Mr. Swale of Settle for tickets and using them with DISCRETION.

"Under such Indulgence, it is much wished that no Person will go upon any of his manors without a Ticket and that Gentlemen will exert themselves to detect POACHERS. Proper persons are appointed to look after the moors and discharge such as go upon His Grace's liberties without tickets.

"His Grace thinks this mode the most likely to afford pleasure to his Friends, and hopes they'll consider it right in him to DISCHARGE such as refuse to ask permission, however qualified.

"POACHERS and DOG BREAKERS will be prosecuted, of which they have this NOTICE."

Mark the phrase "however qualified," and the distinction drawn between "poachers" and mere "trespassers."

The fears of the more radical reformers as to the operation of sect. 36 have hardly been realised, though it has perhaps,

on occasion, enabled men to seize game to which they had no colour of title; and it has certainly given rise to the error of supposing that the keeper enjoys a right of "search," such as is conferred on a *constable* under the Poaching Prevention Act of 1862. We have actually known a keeper lay an information for assault against a poacher who resisted the assertion of this supposed right!

In a very recent case, where a constable had exercised a right of search and seizure, presumably under the Poaching Prevention Act, proceedings were afterwards taken, not under that Act but under a section of the Act of 1831, as this would give the Court an opportunity of imposing much heavier penalties. It was held that, as it had been sought to use the possession secured by the seizure for a purpose not contemplated by the Poaching Prevention Act, such seizure became an *unlawful act by relation*.[1] The constable, said Jelf, J., becomes, in effect, a trespasser *ab initio* (at p. 422).

Great exception was also taken to sect. 35 of the Act of 1831 by which the lord of the manor and his keeper are exempted (as are persons coursing or hunting a hare, fox, or deer, which has been started on other land) from the *penalty* which the Act imposes on every other trespasser in pursuit of game. But the statute, it is to be observed, does not *authorise* the intrusion of such trespassers on private land, and we are not aware that any practical difficulty has arisen from the exemption.

A diminution in the number of serious poaching affrays followed the passing of the Act of 1831; but, even as late as 1862, when the Poaching Prevention Act became law, the number of convictions for the year under the statutes relating to game reached 10,000. The Bill of 1862 actually recited that night poaching and murderous assaults arising therefrom had increased; but the measure met with great

[1] *Stowe* v. *Benstead*, L. R. [1909], 2 K. B. 415.

opposition on the ground that it conferred a right to search suspected persons and carts in the public highways and streets, and, perhaps, even more so on the ground that it directly associated the police with the protection of game. It was said that, if large preserves were to be maintained, they should be protected at the expense, not of the rate-payers, but of the owners themselves.

Then came the Ground Game Act of 1880, under which every occupier of land has, as incident to and inseparable from his occupation of the land, the right to kill and take hares and rabbits, concurrently with any other person who may be entitled to kill and take ground game on the same land.

This statute primarily regulates the relations of landlord and tenant, and its *penal* provisions, restricting the mode and circumstances in which the game may be taken, do not apply when an *owner* does any of the prohibited acts on his own land (*Smith* v. *Hunt*, 54 L. T. 422). The *rights* conferred by the Act do extend, however, to an *owner* in occupation of his own land, although the right of sporting may have been parted with by his predecessors in title.[1]

The Act of 1880 has now been supplemented by sect. 2 of the Agricultural Holdings Act, 1906, which provides for compensation to a tenant who has sustained damage to his crops from deer, pheasants, partridges, grouse or black game.

A very large number of cases under the game laws still occupy the attention of the courts. In the ten years ending 1905, the average number of persons tried thereunder exceeded 7,500 annually; and the statutes, which contain severe sanctions, are in some districts administered with considerable rigour. If three trespassers make vain search for a rabbit by night, one of them being armed with a bludgeon, each of the three men may be sent to penal

[1] *Anderson* v. *Vicary*, L. R. [1900], 2 Q. B. 287.

servitude for *fourteen years*. If a single sportsman, carrying a gun, trespasses by night on an open moor in search of a partridge which is not there, he may, for a first offence, be imprisoned for three months, and, in default of sureties in £10, may be imprisoned for a further period of six months —*i.e.*, *nine* months in all, and he has no right to claim trial by jury. For a second offence, the penalties and sureties are *doubled*, though in such case he is entitled to claim trial by jury. For a third offence, he may be sent to penal servitude for *seven years*.

For cruelty to animals, first, second or third offence, the maximum punishment is three months' imprisonment. During the year 1907, while 491 persons were received into prison for "cruelty to animals," no fewer than 537 (including two women) were imprisoned for trespassing *in the day time* in search of "game or conies"—presumably in default of payment of fines.

During the year ending 31st March, 1909, the number of persons received into local prisons for offences against the game laws was 1,229 (including 3 women), and of these 95 per cent. were ordered to be imprisoned with hard labour!

One of the points urged with great force, during the debates which led to the passing of the Act of 1831, was that, under the barbarous laws then in force, no fewer than 1,200 persons had been incarcerated in a single year.

CHARLES M. ATKINSON.

VIII.—WELSH MEDIÆVAL LAW.

BY the publication of this work,[1] Mr. Wade-Evans has placed all students of things Welsh, and all lawyers interested in the origin and growth of modern legal

[1] *Welsh Mediæval Law*, being a text of the Laws of Howel the Good, namely, the British Museum Harleian MS. 4353, of the thirteenth century, with translation, introduction, appendix, glossary, index, and a map. By A. W. Wade-Evans, Jesus College, Oxford: The Clarendon Press. 1909.

conceptions and institutions, under a debt of gratitude. The Welsh laws or customs, commonly called the "Laws of Howel the Good," have not until recently received the attention which their importance, as sources of information on the political, social, and economic condition of Western Britain in past time, deserves. Howel the Good was a prince who flourished in the first half of the tenth century, and died in 950. He ruled over a very large part of the area which in English Statutes is called the "Dominion," or "Principality of Wales," and Welsh tradition asserts, in the words of Caradoc of Llancarvan, that he "constituted and gave lawes to be kept through "his dominions which were used in Wales till such time "as the inhabitants received the lawes of England in "the time of Edward I and in some places till long "after."

A considerable number of MSS., purporting to contain laws or customs of the Cymry, have come down to us. The preambles prefixed to the fullest and the more important MSS., though not in identical words, record in substance that Howel summoned a Convention of the leading ecclesiastical dignitaries, and six laymen from each cantref in his dominions, to Ty Gwyn (supposed to be Whitland, in Carmarthenshire), and that, as a result of the deliberations of the wise men there assembled, the laws of the Cymry were set down in writing and promulgated with Howel's authority. The law-book so produced is referred to in one MS. as "the old Book of the White House," and in another it is said that Howel "ordered three law-books to be made: one for the daily Court to be always with him; another for the Court of Dinevwr; the third for the Court of Aberffraw; so that the three divisions of Cymru, to wit, Gwynedd, Powys, and Deheubarth, should have the authority of the law amongst them at their need, always, and read."

The earliest edition in print of these laws is the *Cyfreithieu Hywel Dda* or *Leges Wallicae*, compiled by Wotton assisted by Moses Williams, and published in 1730. This work was, however, superseded by the more authoritative compilation edited by Aneurin Owen for the Record Commissioners, and published in 1841 under the title *Ancient Laws and Institutes of Wales*. In neither of these books is any one of the Welsh MSS. reproduced and printed just as it stands. Wotton treated the MSS. as so many recensions of one body of law applicable to all Wales. Owen made the discovery that the Welsh MSS. fell into three classes, setting forth respectively the rules and customs in force in three several districts of the Principality. These he identified as Gwynedd (Venedotia), Dimetia (South Wales), and Gwent (an ancient *Gwlad* or *patria* situate in the extreme south-east of Wales). He accordingly classified these bodies of law into what he called the Venedotian, Dimetian, and Gwentian Codes. Instead, however, of taking one MS. of each class and treating it as typical, he formed the text of each so-called code by blending the MSS. of each class together in such a way as to make it somewhat difficult to trace to its source any particular rule or sentence or passage. His task was very skilfully done, and something may be urged for his method: still we agree with Mr. Wade-Evans and other critics that the result is not satisfactory. In the work before us a better way is followed. It is its distinctive merit that we have here presented for the first time an exact reproduction of one of the best of the surviving MSS.—the Harleian MS. 4353 (MS. V)—which is printed "page for page, line for line, and error for error, except where it was found more convenient to relegate notices of errors to the palæographical notes." (Preface, p. 1.)

The reasons that dictated the choice of this particular MS. are not stated. Mr. Wade-Evans simply says he adopted it on the recommendation of Dr. Gwenogfryn

Evans (a high authority on palæography) "who regards it as the oldest and best of its class." It is not, however, by any means the oldest MS. of these laws. The earliest Latin MS. is that known as Peniarth MS. 28, which is printed in Owen's compilation. The earliest Welsh MS. is Peniarth MS. 29, written about 1200 (according to Dr. Gwenogfryn Evans), which Owen calls MS. A, and made the basis of his text of the Venedotian Code. We cannot help thinking it would have been better if Mr. Wade-Evans had chosen this MS. A for treatment. It is not only the earliest of the codices, but relates to a part of Wales which was independent till 1282, and the laws of which cannot have been substantially modified at the time of its transcription by Norman or English influences. However, the fact that he did not take this course does not diminish the utility or value of his present work, and we gladly recognise the scholarly manner in which he has performed the task he set himself. We hope that he may be able before long to publish the Peniarth MS. 29, which is now deposited (we are informed) in the new National Library of Wales at Aberystwyth, and therefore more easily accessible to research students than heretofore.

In an Introduction (pp. i—lv) Mr. Wade-Evans gives a clear and scholarly description of the MSS. of these laws, states the facts known about Howel's life and reign, and adds a slight but suggestive sketch of the history of post-Roman Wales down to the tenth century. He agrees with Owen's classification of the MSS., but rejects his view that the MSS. of the third class applied to Gwent, over which Howel did not, so far as appears from the evidence, ever hold sway. In so doing, Mr. Wade-Evans is undoubtedly right, and he is probably right also (though this is not certain) in suggesting that it was to Powys or part of that kingdom that this third class of MSS. applied. He discards Owen's misleading use of the word "code," and proposes,

in lieu of that author's designations, to call the three kinds of law-books, the *Book of Gwynedd*, the *Book of Blegywryd*, and the *Book of Cyvnerth*. Blegywryd (we may remark) was the "scholar" whose name is mentioned as having assisted Howel at the Ty Gwyn assembly, and Cyvnerth ab Morganeu was a Welsh lawyer whose book is referred to in some of the MSS. The Harleian MS. 4353, which forms the text of the book before us, is the earliest of the *Book of Cyvnerth* class. We cannot here discuss the historical questions raised in this Introduction, but we may say in passing that we are not convinced that Cunedda and his sons and the "Gwyr y Gogledd" (Men of the North) of Welsh literature came into Wales by sea, even if Mr. Wade-Evans be right in his view that the "History" commonly attributed to Gildas "formerly constituted a distinct book known as the *Excidium Britanniæ*." It may be so, but as we interpret the "History" the "Britain" referred to in chapter 14, on which his argument is based, does not seem to mean the smaller Britannia composed of the provinces of Britannia Prima and Secunda formed under the Diocletian re-arrangement, but the whole of Roman Britain, *i. e.*, the diocese of Britain, created by that re-arrangement of the empire. Mr. Wade-Evans, however, asserts that the *Excidium Britanniæ* was "considerably 'edited' by someone who ignorantly or deliberately misunderstood it," and if we assume this to be the case, he may be right, though in that case something more than "editing" was done by the unknown "someone" referred to so vaguely by Mr. Wade-Evans.

We note with satisfaction his avoidance of the use of the term "tribal system" throughout the work, and his adhesion to the view of Cymric history, adopted by modern scholars, that it exhibits "a steady and unbroken development of Cymric nationality from the day that Cunedda and his sons established themselves in Wales at the commencement of the fifth century," instead of the convulsive

struggles of a beaten and decadent race. The translation (based on that of Aneurin Owen) appended to the Welsh text is excellent; and the glossary of the principal technical terms which is added is much superior in every respect to those of Wotton and Owen, while the explanations and information it contains are derived from and supported by reference to the best and most recent authorities. A useful map of pre-Norman Wales and a full index complete the book, which, both as regards the clearness of the type and general "get-up," reflects great credit on the Clarendon Press.

The space at our command does not enable us to deal now with the problems suggested by a perusal of this interesting collection of laws; but we desire to point out that, though it presents features in the main similar to those possessed by the other *leges barbarorum* of Western Europe, the rules and customs it contains are of special significance, since some of them form points of contact between the more primitive Brehon laws on the one hand and of the more advanced Anglo-Saxon and other Teutonic laws on the other, and are therefore of great importance to the student of Comparative law and the history of legal conceptions.

IX.—CURRENT NOTES ON INTERNATIONAL LAW.

International Maritime Law Congress at Bremen.

THE Ninth Conference of the International Maritime Law Committee, whose head-quarters are in Antwerp, was held at Bremen from September 22nd to 25th, under the Presidency of the eminent jurist Dr. Sieveking, President of the Court of Appeal at Hamburg. Nearly all the maritime nations of the world sent representatives. The English lawyers present were, Lord Justice Kennedy, Mr. R. B. D. Acland, K.C., and Mr. J. E. R. Stephens, besides several

shipowners and underwriters. The subject which occupied practically the whole time of the Conference was the draft code relating to Freight. At the Venice Conference in 1907, it was decided, after receiving the reports of the various national associations, to refer the matter of conflicts of law as to freight to a sub-committee, which was to meet in Paris and prepare a draft treaty to form a basis of discussion at the present conference. Accordingly, the sub-committee met in Paris in February of the present year, and formulated a draft treaty of five articles. Referring to this draft treaty, in opening the discussion on the question of freight, M. Louis Franck, of Antwerp, the honorary General Secretary of the International Maritime Committee, said, it had been thought that the question was not one for international regulation, as the matter was one of contract, and parties arranged their own terms. But they could not know beforehand the nationality of a port of refuge, and moreover, a contract was never a complete code of rules. Therefore, it was desirable to secure uniformity on certain points. He proceeded to contrast the British and Continental rules of law on the subject, pointing out the fundamental differences between the two. Under British law the contract is an indivisible one. If the goods are not delivered, freight has not been earned, and is not payable. But under many continental laws, the shipowner is entitled to something, though the contract may not be fully performed. What he receives is known as "distance freight," or "equity freight." M. Franck suggested that the draft treaty of the Paris sub-committee provided a reasonable compromise. It took the British law as the basis, but some exceptions were necessary in cases where the present British law was clearly unjust to the shipowner. M. Franck, in concluding, pointed out that, by accepting these rules, most continental nations would give up the principle of their present law in order to meet

the British view, and that, therefore, some reasonable concessions might be expected from the British side, if, as he thought was the case, the exceptions suggested, *viz.*, where freight would be allowed, appeared as both equitable and capable of being practically worked. With respect to exception 2, providing that freight should be payable in respect of goods which have perished in the course of the voyage, by reason of their nature or inherent vice, there was considerable discussion. M. Louis Franck thought that the shipowner should not lose his freight in such a case. Any inherent vice in the goods was the risk of the owner of the goods.

Another exception contained in the draft code is that freight shall be payable on "goods which are sold in the course of the voyage on account of their damaged condition, whether the same arises from their nature or inherent vice, or from a peril of the sea." M. Louis Franck argued that there was good reason to allow freight on goods sold in a port of refuge. If the captain acted reasonably in selling, he was an implied agent of the cargo-owner, and would do what any reasonable cargo-owner would do himself. The captain could not in practice ascertain who was the owner of the particular cargo, and even if he could, he could not in practice obtain instructions. He contended that if the master acted reasonably the shipowner should be paid his freight, provided he proved the circumstances. Lord Justice Kennedy pointed out that the clause was not confined to cases where goods did not arrive. It included cases where goods were simply damaged, and where they would arrive at their destination. He thought it was dangerous to give one man the right of selling another man's goods. Moreover, the clause did not require the consent of the owner to be given. He thought it was not a suitable discretion to entrust to sea captains. At the close of the discussion M. Louis Franck formally proposed that "The Conference

is of opinion that the system of distance freight, or freight *pro rata itineris*, should be abolished." The main proposition was adopted unanimously. The draft code was referred back to the Paris sub-committee, in order that they might complete the work already begun by the preparation of a code, the name of Lord Justice Kennedy being added to the sub-committee. The conference next proceeded to discuss the question of compensation for death or injury on board ship. The laws prevailing in the various countries on this subject were explained, but nothing definite was decided, and it was finally agreed to consider the question further at the next conference.

J. E. R. S.

International Maritime Conference at Brussels.

Little is known concerning the deliberations of this important gathering, as is of course natural in the case of an official congress, the delegates to which represent their governments. It was held at Brussels in early October, and was attended on the part of Great Britain by the Hon. Mr. Justice Pickford, Mr. Leslie Scott, K.C., and Mr. H. Gadley, of the Board of Trade. Four draft conventions have for some time been propounded for adoption, dealing respectively with salvage, collision, mortgage, and limitation of liability. It appears that a substantial approach has been made at Brussels to a nearer agreement on these matters than was found possible at the Antwerp Conference of 1905; though, as the conference has been adjourned over the winter, it would be premature to assert that entire unanimity has been reached. Continental nations appear to be willing to accept the ship-master's lien for disbursements; while with regard to the delicate question of limitation of liability, it appears to have been possible to arrive at some accommodation between British and foreign views. It is not exactly true even now to

say that a British owner's liability in case of collision is necessarily greater than that of a French owner. The latter may easily be liable to very much more than £8 per ton damages if his ship survives in fair condition.

It will be interesting to see what line of compromise is recommended for adoption between such radically diverse views as those which respectively limit the liability of the shipowner to the value of the *res* after collision, and to an arbitrary percentage of a guess at its value before it.

Compulsory pilotage seems to have been the great difficulty in the way of the adoption of the collision convention. On the Continent, a pilot is not understood to assume control of the ship. Consequently, compulsory pilotage is no defence: the pilot is only the adviser of the captain. It is easy to understand this view. But it is difficult to see why it should be applied to British vessels, on board of which the pilot is supreme. In fact, the British delegates appear to have made a strong point of the unfairness which would be produced by such an application of an inappropriate principle. There seems to have been some tendency, however, to barter its adoption for a modification of the continental rules in respect of the limitation of liability. Such a bargain would hardly fulfil the description of a compromise "where the principle isn't given up." It seems rather to introduce one anomaly into English Maritime law on condition that another is introduced into that of continental countries.

Twenty-four States definitely approved the collision convention and also the salvage convention. Pending the arrival of April, the work of deliberation will be continued by correspondence.

Appropriation of the North Pole.

Mr. Hereshoff Bartlett, whose striking article on the Centralization of Federal Power, in this Magazine for August, 1907, will be remembered by our readers, has been

making a sensible comment on the claims advanced by alleged discoverers to dispose of the North Pole in favour of a particular State. A certain conflict of opinion on this point appears to have arisen in the press and elsewhere. United States explorers have claimed the territory in lat. 90° N., on the ground of discovery and "occupation." Canadian authorities set up a theory that the Pole is in some way part of the hinterland of Hudson's Bay. For all we know, Russia makes a similar contention, and sweeps in the Pole as a dependency of Archangel and Siberia.

As we pointed out in November, 1907, when writing of Spitzbergen, it is difficult to apply the ordinary rules of occupation in waste places. The ordinary rules regard localities of which it is possible to make some use: and they declare that if the discoverer makes no use whatever of them, they lie open to a new-comer. They declare that the occupant of a definite district has a right to proceed to occupy, within a time which perhaps may be subject to some limitation, the territory in the immediate vicinity. And probably they must be taken to declare that waste land, such as mountains and morasses, which may be useful for the defence of the settlement, are included within its limits. But there must be immense tracts lying within the boundaries claimed by modern States, on which the foot of an explorer has never trodden, and which yet would certainly not be open to appropriation by another Power. The doctrine of a *hinterland*, extending to the watershed, practically places the whole interior of a continent in the hands of the nation which controls its harbours, and leaves it at liberty to develop it or leave it in barbarism as long as it pleases. Such a doctrine has never been accepted. It would have conferred upon Portugal the absolute sovereignty of the Nyassa district of British Central Africa. It cannot avail to exclude the world from cultivable land. But desert wastes are in a

different position. The steppes of Russia, the deserts of China, the peaks of the Himalayas or the Andes, the Diridh More of Scotland—are certainly the objects of definite sovereignty, and lie wholly or in part within the limits of particular States.

How far, then, does the principle extend? How far are waste places, adjacent to national territory, the property of the nation, and how far are they open to a new-comer? The question will best be answered by looking at the position of the waste borderlands which divide settled States. Sometimes these are very extensive; their position will at least afford some guidance to a coherent principle. Clearly, the policy of nations has been, not to regard these tracts as outside the limits of States, but to divide them between the coterminous Powers along the line of the watershed. So, in the Pyrenees, where the sovereignty of France ends, that of Spain begins. But would this be true if no surveyor had ever set up a frontier post there? Incontestably; the mere fact that a peak was inaccessible would not prevent the boundary from being regarded as traversing it. A particularly interesting controversy of this nature was decided in 1902, between Hungary and Austria —the latter Power appearing as guardian or successor (whichever metaphor is preferred) of Poland. In the Western Carpathians, in the district known as the Tatra, there are various picturesque tarns, which have now become favourite tourist resorts. Raised high above the Hungarian plains, they are cool in summer; and in winter they provide the snow sports which are now in vogue. Their precise locality becomes important. It was determined in 1902 by an arbitral commission, which proceeded on a minute examination of the natural features of the district. The Penj-deh incident, which so nearly led to war with Russia in 1885, arose from a delimitation of a

similar nature. So far as the Polar question is one of frontier delimitation, Denmark, in virtue of Greenland, would appear to be entitled to the actual Pole, as having the nearest settlements to it.

But Mr. Hereshoff Bartlett suggests with force that there is and can be no frontier question. The Pole is covered by the Arctic Ocean. And though it may be a singular expression to speak of the Arctic Ocean as the common highway of nations, it is undoubted law at the present day, that a sea, however remote and unfrequented, is part of that highway. Nares, Osborne and others, seem to have coasted round the north of Canada: Nordenskiöld round that of Siberia. So that the probabilities, confirmed by the explorers' testimony, are that the Pole lies in water, and the Polar district—"is no man's land, because it is not land."

The main objection that occurs to one is this. If there is water at the Pole, it is certainly frozen water. Is it not as much capable of defined delimitation and occupation as land? Mr. Hereshoff Bartlett says the ice is floating: the liquid ocean is there, and there is merely a shifting surface of ice-floes and ice-bergs which, we may put it, are really no more susceptible of occupation than seaweed. They are, indeed, in constant eastward motion. That, if it be a fact, would go far to remove the difficulty. On the contrary supposition that the ice is fixed, it seems difficult to say that such a solid and firm mass is incapable of appropriation because it happens to have the sea under it. If it is permanent and capable of appropriation in fact, it seems unnecessary to hold it incapable of appropriation in law. Fortunately, the whole matter is of little practical moment.

Moulis v. Owen.

This note is headed as above, in order to connect it with the discussion of *Moulis* v. *Owen* in previous numbers of this

Magazine (Nov. 1906, p. 98; Aug. 1907, p. 468); but it is concerned with a more recent case—*Saxby* v. *Fulton* (L. R. [1909], 2 K. B. 208). In *Moulis* v. *Owen* (L. R. [1907], 1 K. B. 750), a bill of exchange was drawn by a domiciled Englishman in Algeria in favour of a domiciled Algerian. The consideration was money lent. In fact, the money was lent to pay gaming debts incurred in Algiers. Darling, J., held that even if the law applicable to the bill was the law of England, that law did not forbid foreign gaming. The bill was consequently held valid and enforceable. The Court of Appeal reversed this decision. It was held that the law of England was applicable, and that it did forbid foreign gaming. The law of England was held applicable as the *lex loci solutionis;* and on general principles there might be something to be said for that view. But it is strange that no reference was made to the Bills of Exchange Act, 1882, s. 72. According to that statute, the interpretation of the drawing of a bill "is determined by the law of the place where such contract is made," and not by the law of the place of payment. It may have been thought too obvious for argument that the nullification of a bill for illegality is in no sense an "interpretation" of it. Westlake seems to support the opposite. He deals with the legal effect of the contract of acceptance of a bill "on the supposition that in 'interpretation' it was intended to include 'obligation'" (*Private International Law,* s. 329). However that may be, the Court of Appeal passed by the section, and applied English law. So proceeding, they found themselves concluded by an old case of *Robinson* v. *Bland* ([1760], Burr. 1078; W. Bl., 234, 256). It has been pointed out in these columns that the resemblance of *Moulis* v. *Owen* to *Robinson* v. *Bland* is superficial. In the former case one party was a domiciled native of the country in which the bill was drawn in his favour. In the latter both parties were transient foreigners. In the one

there would have been no remedy on the bill by either competing law. In the other the plaintiff would have a remedy if his own law were applied. In *Robinson* v. *Bland*, Lord Mansfield expressed a *dictum* that the law decisive of the validity of a bill is the law of the place where it is payable. He followed up this *dictum* by saying that it was "unnecessary to consider" how far the law of the place of drawing applied to the bill before the Court: which shows what slight weight is to be attached to the *dictum*. It was accepted as of conclusive weight by the Court of Appeal in *Moulis* v. *Owen*: and the then Master of the Rolls was led to cast reflections on the accuracy of the report in *King* v. *Kemp* ([1863], 8 L. T. 255), which treated the question as still open. The whole Court was apparently of opinion that the law of the place of payment governed the question, and that that law (the English) treated a bill as invalid, if given for gaming, wherever that gaming took place, from China to Peru. Moulton, L.J., dissented as to the latter proposition, but apparently not as to the former.

In *Saxby* v. *Fulton*, the Court had no opportunity of examining the interesting question as to the proper law applicable to a bill of exchange, for no bill was in question. It was a simple action for money lent, to which the defence was that the loan was for gaming purposes. Bray, J., affirmed by Williams, Buckley and Kennedy, L.JJ., held that a decision of Lord Lyndhurst (*Quarrier* v. *Colston* [1842], Ph. 147), was precisely in point, and was not affected by *Moulis* v. *Owen*. In that case Lord Lyndhurst decided that money lent abroad to pay gaming debts could be recovered. As he was sitting as an appellate judge from the judge of first instance in Chancery, his decision ought not to be disturbed. And indeed, there could be no reason for disturbing it, except on the high and transcendent ground of public policy over-riding all ordinary considerations

of comity. The loan of money abroad by A. to B. for whatever purpose made, must normally be a matter to be regulated by the law of the country where the transaction takes place. Once establish that the proper law of the loan is the law of Monaco, and it follows that, unless all comity is disregarded, the contract is free from all considerations of English law. "Even if that authority (*Quarrier* v. *Colston*) did not exist, it seems to me that the defendant *could not* succeed," says Lord Justice Kennedy (p. 234).

It is, of course, just possible to argue that in *Saxby* v. *Fulton* the proper law of the contract was English, because of the transient nature of the presence of the contractors in Monaco. Saxby and Brook (the latter being the defendant's testator), lived in England, but had for years been in the habit of travelling in company to Monte Carlo, in the Principality in question. The sum in dispute was large—some £4,000—and consisted of cash advanced when they were staying there. The Court appears to have taken judicial notice of the fact that gaming is lawful at Monte Carlo; and it refused to assume that the law of Monaco was the same with regard to gaming as the law of England. But it might have been possible to hold on principle that the general rule of *lex loci contractus* did not apply to a loan for personal expenses made by one travelling companion to another. *Quarrier* v. *Colston* stood in the way of this. We think it stood in the way beneficially: for the introduction of accidental exceptions to a broad rule is never to be encouraged. If Messrs. Saxby and Brook's contract was properly subject to English law, then every Court in Europe ought to have applied English law to it. The Monogasque Court ought. And thus we reach the position that two foreign visitors contracting in England might invoke the English Courts to compose their differences by French law. It is far simpler and more satisfactory to apply as the *primâ facie* rule in a case like this the law

of the place of contract. Not that the *lex loci contractus* need be laid down as the sole and sufficient rule for all cases, which would be an impossible position to maintain; but that in a case of a loan of money for personal expenses it is a natural and convenient one.

Lex Situs.

There is a limit to the surprising doctrine of *De Nicols* v. *Curlier* (2),[1] according to which the ownership of land in England was held to depend on the effect of French law, through the invocation of a tacit settlement created, or assumed to be created, by that law for two persons who married when subject to it. It will be remembered that the House of Lords, reversing the Court of Appeal, took a severely contractual view of marriage, and held that its proprietary incidents were settled once and for all at the time of the marriage, and could not be varied by a subsequent change of domicile. This doctrine, which reduces marriage to a business arrangement, was applied remorselessly by Mr. Justice Kekewich to the case of land. Land acquired by the consorts, after their removal to a fresh domicile, is swept into the net of their original matrimonial *régime*, regardless of where it is situated. This is naturally inconsistent with the leading principle of land law, that questions regarding land must be decided by the law of the land. No one, indeed, would go so far as to say that a child could not inherit English land unless its parents were married by English law. But any dealings with the land itself, must, one would think, be such as the English law would recognise, before any effect can be given to them in England. A marriage, wherever solemnised, and whatever the domicile of the parties, or an express settlement executed abroad between domiciled foreign parties, could

[1] L. R. [1900], 2 Ch. 410.

not on principle avail to create rights in land in England which would not be created by similar events transpiring in England, except so far as *De Nicols* v. *Curlier* (2) is authoritative. The capacity to enter into the transaction might, of course, be measured by the personal law, but the nature and effects of the transaction must be estimated by the law of the *locus*.

In *The Bank of Africa Ltd.* v. *Cohen* (L. R. [1909], 2 Ch. 129), *De Nicols* v. *Curlier* (2) was not referred to. The transaction was a hypothecation by a domiciled English wife of land in the Transvaal for the benefit of her husband, in favour of an English bank. The transaction was held to be governed by the *lex loci;* and it was invalid, because the notices avoiding the operation of the SC. Velleianum had not been given, in accordance with Roman-Dutch law. If the logical deductions from *De Nicols* v. *Curlier* had been applied, it would naturally have been held that a husband marrying since 1882 in England without a settlement, expects to be able to get the benefit of mortgaging his wife's landed property if he can induce her to carry through the transaction. The parties were not even domiciled in the Transvaal, and the proper course, according to the earlier case, would seem to have been to hold that the law of the matrimonial domicile governed dispositions of the consort's land, wherever situate, and that the hypothecation was good. Certainly, *De Nicols* v. *Curlier* turned on a question of who was entitled to succeed to land; whilst here there was a question of who was entitled to dispose of it. There seems to be no substantial difference involved. The right to dispose of land by will, and the right to dispose of it, *inter vivos*, are not such alien conceptions.

The Court of Appeal held that the hypothecation was bad. The local law applied. The law of the matrimonial

domicile did not. Somewhat curiously, the provisions of the Roman-Dutch law, which invalidate such a mortgage unless certain notices are given, were treated as affecting the capacity of the would-be mortgagor. Even so, they were treated as properly measured by the *lex loci*, just as though a person of twenty were to be treated as minor in England for the purpose of sale of land, although he might be of age by the law of his domicile. Historically, no doubt, the matter is one of capacity. The prohibitions of the SC. Velleianum have been whittled away, so that they no longer seem to form part of the conditions of a *status*. They are comparable rather to the prohibitions which French law denounces against marriage by persons under twenty-five without observance of the *acte respectueux*. It is always questioned whether such slender restrictions which can readily be surmounted can really be said to affect the capacity at all.

But if (inconsistently, as we suggest, with *De Nicols* v. *Curlier* (2)), the purported mortgage was bad, can the same be said of the contract to mortgage? In *Ex parte Pollard* ([1840], Mont. & Ch. 239), a contract to mortgage land in Scotland was specifically enforced (which it would not have been, in the *situs*). But the judgment of the Court of Appeal in the present case yields the question of the validity of the contract to the determination of the *lex situs*. As a contract of suretyship, it is equally obnoxious to the SC. Velleianum with the mortgage which proceeded upon it. Therefore, the plaintiff bank not only lost their security, but have no claim for damages. This seems open to question. The Transvaal law imposed no absolute bar on the transaction, only it had to be carried through, with certain formalities. By her contract, the lady virtually agreed to carry it through with those formalities. If this contract is subject to the law of England, she ought to have been decreed to perform it. It was, in fact, held that it was subject

to the law of the Transvaal: accordingly that it was invalid, as not having itself been made with the formalities of the SC. Velleianum. In short, a contract dealing with foreign land is to be interpreted, and is to have its operation, according to the law of that land: an obviously just result, but one which, to square with *Ex parte Pollard*, must not be taken to extend to procedure and forms of remedy.

T. B.

X.—NOTES ON RECENT CASES (ENGLISH).

NOTHING is more noticeable in legal literature than the continuous shrinkage of Chancery law reporting. Formerly in the "authorised" reports three volumes were dedicated to Chancery and only two to King's Bench cases. Some years ago the number of volumes was reduced to two, and from the way things are going it will soon be possible to put all that is worth reporting into one. Meanwhile the King's Bench volumes are growing steadily in size, although the reporting of *nisi prius* cases has gone completely—and most unfortunately—out of fashion. These phenomena may partly be explained by the circumstance that now the Chancery Division is largely occupied in deciding mere questions of fact on oral evidence, but no doubt it is also partly due to the greater discrimination exercised by reporters in deciding what should be reported. For instance, cases on the interpretation of wills used to be to the Chancery reporter—where paid by lineage—the sort of gold mine that rating and revenue cases are to his King's Bench brother. Now he never reports them unless they actually decide something, which is rarely the case.

One of the cases reported from the point of view of the public overshadows all the rest in interest and importance.

It is *In re H.'s Settlement, H.* v. *H.* (L. R. [1900], 2 Ch. 260). In that case a lady had a somewhat unruly son. She or her advisers struck on the brilliant notion of making him a ward of Chancery, and so being able to threaten him with prison if he did anything to which his mother objected. To give the Court jurisdiction the lady settled £100 on him. Soon afterwards the son did something his mother strongly objected to—he married, and he was promptly sent to gaol. Not only so, but the young lady whom he married, and who knew nothing of his being a ward of Chancery, was apparently within an ace of being sent to gaol too. The whole proceedings took place *in camera*, and it is only with the judge's permission that the world has learnt anything about them.

There can, of course, be no question as to the jurisdiction of the Court over its wards. Such jurisdiction, however, was originally assumed for the purpose of protecting the ward's property—so much so, that till this day, it does not exist, except the minor has property. Here it is being used to give a mother power in effect over her son, which the law does not give her. Now that Mrs. H. has shown the way, every parent who is on bad terms with his children can settle a few pounds on them, make them wards, and hold out the prospect of gaol in case of any act of disobedience. This may be very desirable, but if it is to be introduced, it had better come from the Legislature than from the decision *in camera* of a Chancery judge.

But it is not merely a question of parent and child. Anybody may settle money on a minor and make him a ward of Chancery, and then, as next friend, exercise a form of despotism over him. And it is not merely the minor who is liable to be affected. Warrington, J., expressly laid it down (*see* p. 264), that ignorance that the boy was a ward

of Court did not make the young lady's marriage to him any the less a contempt of Court. This, no doubt, is so. But as shown by *Herbert's Case*, 3 P. Wms. 115, where the rule is laid down, it is so only because there is no other way of protecting a wealthy minor from being entrapped into marriage (and *see* per Chitty, J., in *Metropolitan Music Hall Co.* v. *Lake*, 58 L. J. Ch. 513). Here the rule was being called into operation simply because the minor's mother objected to his marriage. All the wealth he was entitled to she herself had conferred on him, for the very purpose of being able to set the rule in force against him and the lady. Fortunately, his lordship drew the line at imprisoning the lady for marrying the "young heir." But other judges may not be so squeamish. The generous way in which the Chancery Courts sent persons to gaol for interfering with the course of justice where no harm was done and none intended—which was denounced by Lord Russell of Killowen in *Reg.* v. *Payne* (L. R. [1896], 1 Q. B. 577),—is rather an uncomfortable precedent. Such committals took place, too, in open Court; when the judges are sitting *in camera* and therefore free from all criticism, it is not to be expected that they will be less inclined to assert their powers.

Most of the other cases reported are very useful but not exciting. Thus, in *In re Brockman* (L. R. [1909], 2 Ch. 170), the right of a client to have his solicitor's bill taxed is clearly set out. If he brings it in for taxation within one month from delivery, that right is absolute. If he brings it in after that date, the Court may impose conditions; but a submission to pay is not an ordinary condition, and when it is inserted—if the client does not ask for delivery of his papers—it should be merely a submission to pay what is payable, not what is due. In other words, while the Court will not help a client to get back his papers unless he pays all costs, whether

statute barred or not, where he merely asks for taxation the Court must grant it if he is willing to pay all that can be recovered from him.

A strange incident occurred in *In re Lord Chesham's Settlement* (L. R. [1909], 2 Ch. 329). That was a case on the construction of a settlement of certain chattels to attend the inheritance as heirlooms. The case was heard by Eve, J., who held that the chattels vested absolutely in a tenant-in-tail who died before his father, the life tenant. The Court of Appeal over-ruled this. The strange incident was that the very same point on the very same settlement had been decided in the very same way by Chitty, J., some twenty years ago (*In re Lord Chesham*, L. R. [1886], 31 Ch. D. 466), and this was noticed by nobody till Farwell, L.J., drew attention to it in the Court of Appeal.

Two rather peculiar points upon married women's wills were decided in *In re Harris, Leacroft* v. *Harris* (L. R. [1909], 2 Ch. 206) and *In re Illingworth, Bevir* v. *Armstrong* (L. R. [1909], 2 Ch. 297). In the former, Parker, J., held that where a married woman's will would have passed property had it been her separate estate, it will, when the property belongs to another person, put that person to his election if the will confers benefits on him. In the latter, Eve, J., held that an appointment was made "during coverture" when it was exercised by a will made by the donee during marriage, although the donee became a widow before her death brought the will into operation.

J. A. S.

Slander is doubtless coeval with rudimentary speech, and it has survived to impart a relished spice to social converse to-day. It has the further claim to approbation, that when imparted to two or three gathered together without the presence of the maligned object, it is less a stimulus to

rough and immediate objection than if the words of depreciation were submitted to him personally. When the art of writing enlarged into libel, this propensity *ad infamiam cujuspiam edere*, the Courts were so frequently occupied with it, that it is amazing to find that the law affecting it is still floundering in elementary definition. *Jones* v. *Hulton & Co.* (L. R. [1909], 2 K. B. 444), is the illustration. The Lord Chief Justice holds that in an action for libel it is immaterial that the defendant did not intend to refer to the plaintiff; and that the jury are to find in favour of the plaintiff if they are of opinion that the disparaging words are understood by his friends to refer to him. Farwell, L.J., refines upon this, and dissects "intention" into that which is in the writer's mind, and that which is expressed in the words the writer uses as interpreted by persons who know the plaintiff. The view of both these learned judges seems to be that the writer's intention to refer to the plaintiff does not come under consideration; that the writer or publisher may fall under liability even though he was unaware that any person of the name of the plaintiff existed; and, that the question of the person to whom a libel refers is for the jury on the evidence. Well-established cases accord with this opinion. But Fletcher Moulton, L.J., is vigorously and unflatteringly opposed to these views of his brothers on the bench, and, in a judgment of eighteen and a-half pages, holds that the intention of the writer to refer to the plaintiff is the critical issue; that this is inevitable by the pleadings; that "an unintentional libel is as impossible in English law as an honest fraud"; that the judgment of Channell, J., in the Court below, which had just been referred to by the Lord Chief Justice as being in "clear and correct language," is a "most remarkable ruling"; and, that the principle that a man must be held responsible for the ordinary meaning of his words does not apply where the cause of action depends on intention.

It is well that *Howes* v. *Bishop* (L. R. [1909], 2 K. B. 390) emphatically follows *Barron* v. *Willis* (L. R. [1899], 2 Ch. 578) in deciding that, in a case of voluntary gifts between husband and wife, the equity rule established by *Huguenin* v. *Baseley* ([1807], 14 Ves. 273) does not apply, for the contrary opinion has been held in distinguished quarters. In *White and Tudor* (7th Edition, 1897) it is stated that husband and wife come under the doctrine "that when a relation of confidence is shown to exist from the position of the parties, the law presumes that the gift was the effect of influence induced by those relations and the burden lies on the donee to show that the donor had independent advice or adopted the transaction after the influence was removed." Possibly this view was founded on Lord Penzance's judgment in *Parfitt* v. *Lawless* (L. R. [1872], 2 P. & D. 462), in which man and wife are specifically mentioned as falling within the doctrine. It is from a tender feeling towards his lordship, perhaps, that the Court now suggest that he "made a slip" in this illustration, but the judgment reads as if he was expressing his deliberate view. However, it may now be accepted as an established rule that in such gifts the burden of proof will be on "the party who impugns the instrument and not on the party who supports it."

Ever since *Pettit* v. *Lodge and Harper* (L. R. [1908], 1 K. B. 744), noted in Vol. XXXIII, No. 349, p. 472, of the *Law Magazine and Review*, the Courts have enforced strict compliance with the Bills of Sale Acts. In *Smith* v. *Whiteman* (L. R. [1909], 2 K. B. 437), the sequence of proof by which a bill of sale was pronounced to be void is more than usually clear and direct. The pertinent point of the case is, that before the instrument was prepared a printed notice of a condition of defeasance on which the transaction would be carried out was handed to the grantor. Sect. 7 of the

Act of 1882 enumerates the grounds on which personal chattels are liable to be seized by the grantee. The condition is not one of these, and therefore the goods could not be seized. Sect. 8 requires every Bill to be registered, under penalty that it shall be deemed fraudulent and void as regards the personal chattels comprised in it; and sect. 10 enacts that any defeasance condition not in the body of the bill is to be deemed part of it, and unless before registration it is written on the same paper that the bill is, the registration is void. The defeasance condition was not on any part of the bill, and therefore the registration was void; and therefore, again, under sect. 8 the bill itself was void, and the sixty per cent. which the grantee hoped to enforce was gone also.

An agent has exceptional privileges, founded on the course of business, and in some cases is enabled to pursue a remedy in contradiction to his written contract. *Harper & Co.* v. *Vigers Bros.* (L. R. [1909], 2 K. B. 549), illustrates this in a very complete manner. The plaintiffs, as agents for owners of an un-named ship, contracted with the defendants to bring at a certain rate, "with a brokerage of five per cent.," a cargo from abroad to England. Then the plaintiffs, as agents for the defendants, entered into a charter-party with the agent of a foreign shipowner to bring the cargo over at a lower rate; the agent allowing the plaintiffs half his commission. So that in fact, the plaintiffs, when they entered into the first contract, had no footing to support it. As agents for a person who, as far as they and their undertaking were concerned, was non-existent, they contracted with the defendants; and then announcing the defendants as their principals, they made a charter-party on their behalf. So far, the plaintiffs stood to gain the difference between the two freightage rates, plus a brokerage from the defendants of five per cent. on the higher rate, and

plus half the commission of the agent of the foreign shipowner on the lower rate. But the question was raised whether they could, in contradiction of their own contract, sue the defendants, or whether the defendants were not entitled to the lower rate of the charter made in their name as principals. It was held that the plaintiffs were entitled to succeed. Of course the defendants were in no worse position by the decision than they were willing to occupy when they contracted with the plaintiffs. But, it may be doubted whether the plaintiffs, having recovered as principals, were entitled to their brokerage. However, the judge, on the ground that the contracts of the plaintiffs were "an entire misrepresentation of the true state of things," refused them costs. The case exhibits a way they have in the City.

The Court of Appeal have confirmed three cases already noted in the *Law Magazine and Review*, viz., *Read* v. *Price* (reported on appeal in L. R. [1909], 2 K. B. 724, and noted in Vol. XXXIV, No. 353, p. 480); *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners* (reported on appeal in L. R. [1909], 2 K. B. 604, and noted in Vol. XXXIV, No. 353, p. 482); and *Hertfordshire County Council* v. *Great Eastern Railway* (reported on appeal in L. R. [1909], 2 K. B. 403, and noted in Vol. XXXIV, No. 352, p. 341).

T. J. B.

SCOTCH CASES.

In *Barry Limited* v. *Edinburgh Cork Company* (46 S. L. R. 751), two important and well-established principles of the law of contract were placed in apparent opposition. It cannot be doubted that a consensual contract, such as sale, can be fully established by word of mouth alone; but in this case a writing followed which the defenders maintained

must be taken to be the only record of the contract, or, as they put it, the proposed contract. It was argued for the defenders that the fact of a writing having been handed by one of the parties to the other at the interview at which, according to the pursuers, the verbal contract of sale was concluded, took the sale out of the category of a verbal one, and necessarily confined the proof to what was contained in the writing. No evidence, it was said, could be permitted of previous verbal communings, and as the writing took the form of an offer which was taken away by the recipient, but not formally accepted in writing, it was maintained by the grantor that no contract had been concluded, and that there was therefore no breach to found an action of damages. The Court found that the contract had been established verbally, and that the writing was merely employed to give emphasis to some of its leading features. In giving judgment Lord M'Laren said:—"There have been many alterations by statute on the details of the law of sale, but not on the principle that sale is a consensual contract and may be proved by any evidence showing that the parties entered into a bargain. I should be against any attempt to throw contracts of sale into categories and to say, that if a particular bargain does not fall into one of these the parties are to be held to be only in negotiation." Although it does not seem to have been referred to, either in argument or judgment, attention may be called to the provision in sect. 3 of the Sale of Goods Act 1893, that "a contract of sale may be made .... partly in writing and partly by word of mouth."

We commented in the May number of this magazine upon the extraordinary number of cases recently before the Scottish Courts depending on the interpretation of "charitable purpose" in a testamentary settlement (Vol. XXXIV, p. 344). Two others now fall to be added to the list. In *M'Connochie's Trustees* v. *M'Connochie* (46 S. L. R. 707), the

words of the testator imported a division of the residue of his estate among "such educational charitable and religious purposes within the city of Aberdeen," as his trustee should "select to be the recipients thereof." Contrary to the general tendency exhibited in the previous decisions to give effect to the testator's intentions, the Second Division in this case did not feel itself at liberty to disregard the ruling of the House of Lords as to the vagueness and uncertainty of the words "educational" and "religious." The judges therefore set aside an ingenious argument that the testator intended to benefit one class and one class only, *viz.*, those organisations which were at once educational, charitable *and* religious. It was held that under the words as they stood there was nothing to prevent the trustee benefiting a religious body or an educational body without attempting to show that it was also a charitable body. Lord Low came to this decision "with much hesitation and with some regret"—a regret with which we sincerely sympathise.

In the other case—that of *Mackinnon's Trustees* v. *Mackinnon* (46 S. L. R. 792)—the words were "such charitable or philanthropic institutions" as the trustees might select. The First Division in this case had no difficulty in sustaining the bequest on the same grounds as in *Hay's Trustees* v. *Baillie* ([1908], S. C. 1224), and *Paterson's Trustees* v. *Paterson* ([1909], S. C. 485), both referred to in our previous notice (Vol. XXXIV, p. 344). The word "philanthropic" was held to be merely exegetical of "charitable," and capable of being treated as a synonymous expression. In this case the Inner House reversed the judgment of Lord Johnston (Ordinary), who was also Lord Ordinary in *Hay's Trustees'* case, where the judgment then under review was also reversed. In the Lord Ordinary's note to his Interlocutor in the case now under review, he

accepted the ruling of the higher Court in *Hay's Trustees'* case, and stated that he was now satisfied his previous judgment had been erroneous. He, however, distinguished between that case and the present, and was unable to hold that "philanthropic" was either "an alternative for or exegetical of 'charitable.'" The First Division, as has been shown, found themselves able to go this length.

Whinney v. *Gulf Line Limited* (46 S. L. R. 497), related to a claim for registration of a transfer of shares, which was resisted by the directors of the company, on the ground that the transferor was due the company certain sums in respect of arrears of calls on *other* shares standing in his name. While correspondence was passing between the respective parties and their solicitors, the Gulf Line Limited called a meeting of the company to pass a resolution altering the articles of association so as to give the company a lien on all shares held by the members, whether fully paid or not. Thereafter the directors founded on the amended article, and continued their refusal to register the transfer previously presented to them. They maintained that alterations of the articles of association must be held to have come into force when the company was formed, and founded upon sect. 50 of the Companies Act 1862; *Andrews* v. *Gas Meter Company* (L. R. [1897], 1 Ch., 361); *Allen* v. *Gold Reefs of West Africa Limited* (L. R. [1900], 1 Ch. 656). It was said that the petitioner here was not a distinct and different person from the transferor, and was therefore subject to the same liability. Further, it was argued that a transferee did not become a shareholder till he was entered on the register, and in accepting a transfer took the risk of alteration in the articles of association before registration—*Pepe* v. *City and Suburban Permanent Building Society* (L. R. [1893], 2 Ch. 311): *Moir* v. *Duff & Company* ([1900], 2 F. 1265), per Lord Trayner, at p. 1272. The Court ordered the register

of the company to be rectified so as to give effect to the transfer. The judgment proceeded on the ground that the transfer was a fair and open one, without any collusion, and that the law as represented by the company's counsel would lead to the most inequitable results.

The point in *Stewart* v. *Williamson* (46 S. L. R. 918), was whether a provision in a lease as to a valuation of sheep stock, at the expiry of the tenancy, was to be considered an arbitration under the Agricultural Holdings (Scotland) Act 1908. In the event of the Act being held applicable, the procedure was simplified by the compulsory introduction of a single arbiter instead of two arbiters and an oversman. It was argued against the application of the Act, that the valuation provided for in the lease was not an arbitration. A valuation was a method of *avoiding* disputes, while an arbitration was a means of *determining* disputes already in existence. The Sheriff-substitute gave effect to this distinction but the First Division reversed. The Lord President admitted that such a distinction had been drawn, but was of opinion that "decisions on a question whether a case did or did not fall under the English Common Law Procedure Act of 1854 were not authoritative in regard to the interpretation of an Act of Parliament dealing with Scottish Agriculture in 1908." "It is of no consequence," said Lord Kinnear, "whether two persons are in controversy as to liability to pay or as to the amount to be paid. In either case there is a dispute which must be settled in one way or another."

Some interesting opinions were delivered in *Williamson* v. *Meikle* (46 S. L. R. 915), on wrongful intention in the use of a trade name. It was practically conceded that in this case there was no wrongful intention, but it was maintained that there had been wrong in fact, in respect of which the pursuer was entitled to the remedy of interdict.

The managing director of the "Kelvindale Chemical Company" severed his connection with that company and started a similar business in the same neighbourhood under the name of the "Kelvinside Chemical Company." The evidence led went to show that the similarity of the names had led to inconvenience through misdirection of correspondence, but the Court held that the pursuer, who sought interdict, had failed to establish that the name chosen by the defender was calculated to mislead his customers or to divert his business. The Sheriff-substitute, before whom the case first came, and afterwards the Sheriff on appeal, granted the interdict, but the Court recalled. Lord Skerrington said:—"It is trite law that, apart from statute, there can be no right of exclusive property in a name, either a name under which a trader carries on his business or a name which he chooses to apply to his goods. The remedy which the law gives to a person who has used a particular name in trade is, that he is entitled to prevent others from using the same name in such a way as is likely to mislead the public into thinking that the business or the goods so described, is or are the business or the goods of the pursuer."

The Companies (Consolidation) Act 1908 provides (sect. 278), that "where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given." This provision is practically the same as that in sect. 69 of the Companies Act 1862, which is now repealed. It may be noted, that although, since the date of the Act of 1862, the section has been frequently

applied against plaintiffs in England, there was, until now, no reported case of a similar judgment in Scotland. The case now referred to is *New Mining and Exploring Syndicate Limited* v. *Chalmers* (46 S. L. R. 1002). In point of fact, the earlier case of *Horn* v. *Tangyes* ([1906], 8 F. 475), involved exactly the same question, and the same judgment was given, but the report only deals with a preliminary finding as to the competency of the appeal from the Sheriff Court to the Court of Session. It is not to be assumed, however, that prior to 1906 the statutory provision was never brought before the Scottish Courts. On the contrary, the section was frequently pleaded, but, chiefly on account of the existence of counter-claims (rendering it difficult to say which party was pursuer and which defender), no practical application ensued. The provision itself is a very necessary protection to defenders who are sued by an impecunious limited company. In many cases wealthy directors launch an expensive litigation on very doubtful grounds against a defender who, if he is successful, will never recover a farthing of his costs. A trustee in bankruptcy has personal responsibility and proceeds with caution, but a limited company with no assets is a mere puppet to be worked at will, and without risk to the individual wire-pullers.

The extent to which the public is entitled to protection against danger arising from dangerous machines or unfenced localities was considered in *Reilly* v. *Greenfield Coal and Brick Company, Limited* (46 S. L. R. 962). We had occasion lately to refer to this subject in connection with other cases (Vol. XXXIV, p. 220), but as the authorities were reviewed at considerable length in this case, the general result may be again referred to. The accident which gave rise to the action was caused by a series of miners' hutches running on a tram line at a point where it crossed a cart road. The tram line was a double line about

six feet wide, worked by an endless wire rope with hutches attached at intervals of forty yards, kept going more or less continuously at a rate of about three miles an hour. The line was unfenced and crossed the road on the level. The road had been used by the public for at least fourteen years either of right or by tolerance. This action was brought for damages for the death of the pursuer's son, aged about four years, who was killed by one of the hutches. It was held that as the hutches were not under the direct control of anyone, but travelled, so to speak, automatically, the tramway was a dangerous machine, placing the defenders under duty to the public to take precautions against its injuring anyone.

In the course of his judgment the Lord President said: "The foundation of this class of case is relationship of duty. A relationship of duty may be to everybody or it may be to a limited class of persons, and that will arise from the circumstances. A man who sends out, by the hands of an unskilled messenger, a loaded gun, has really got a duty to everybody, which in the case I am putting he has neglected. A man, on the other hand, who quite lawfully upon his own premises may have dangerous holes into which a person may tumble, has no duty to the world in general, but he has a duty to those persons whom he invites upon his premises or allows to go there upon ordinary business avocations. . . . I think some confusion of thought arises from the use of the word 'dangerous.' A thing may be dangerous at one time and not at another." As a *reductio ad absurdum* his lordship instances a proprietor or occupier who has a pebble on ground to which other people are admitted. "The pebble in one sense can hurt nobody; but if a small child takes up the pebble and swallows it, the pebble will be an element of danger to that child. Nobody would be so absurd as to suppose that there could possibly be an action of damages against the proprietor. Again, let

us take the case of artificial or ornamental water, as in *Hastie* v. *The Magistrates of Edinburgh* [1907], S. C. 1102, where we held that there was no relevant averment of want of duty against the magistrates. That was not such an extreme case as the pebble, because one might fairly say, using ordinary language, that there was some element of danger in the pond. Then, third and lastly, you get into the other class of things where the thing is actually dangerous in itself—that is to say, where there is what I may call active danger in it, such as the case of the loaded gun, poison, or fire."

The element in this case which carried most weight with the Court, was that the haulage of the hutches was automatic, and when once set in motion in the morning had no special supervision until it was stopped at night. There was no person in charge as in the case of a locomotive, the driver of which, if he saw the line encumbered by somebody, would take care not to drive over him. "If you put a machine of that sort in a place where you know the public generally are going to be, you must take precautions to try to prevent them from falling victims."

R. B.

IRISH CASES.

There is a distinction between "reportable" cases and "notable" cases. Not many in the last quarter's numbers of the Irish Reports come properly under the latter class. Deducting those which deal with purely Irish statutes and practice, and which therefore are not very suitable for the pages of the *Law Magazine*, the residue is not large.

In re Adair ([1909], 1 Ir. R. 311), is a case upon a point which has already several times come up for decision—the effect of a condition in a settlement intended to secure the personal residence of a tenant for life in the mansion-house on the settled estate. The settlement here provided that

every person who should become actually entitled as tenant for life should, for at least six months in each year, dwell and reside in, and keep in good order and condition, the mansion-house on the settled lands; and if any person so entitled should "refuse or neglect" to dwell or reside, the limitation to the use of such person should determine and become void. The actual tenant for life was an officer in the Royal Marines, and as such was liable for service abroad. He proposed to sell part of the lands to tenants under the Land Purchase Acts, and the first question was, whether by so doing he would incur risk of forfeiture. This question was readily answered in the negative: a person entitled to sell under the Settled Land Acts can sell under the Land Purchase Acts, and it has been held that such a fetter is void so far as regards a sale under the Settled Land Acts (*In re Richardson*, L. R. [1904], 2 Ch. 377), although it is valid until such sale (*In re Trenchard*, L. R. [1902], 1 Ch. 378). It was further decided—and this does not seem so completely covered by previous authority—that absence from home on military or naval duty would not be "refusal or neglect" within the meaning of the condition. This is partly on grounds of public policy.

Rodgers v. *Houston* ([1909], 1 Ir. R. 319), is a case on the sometimes difficult subject of implying equitable limitations. A settlor conveyed land to trustees, to hold in trust for named persons as tenants in common. There were no words of limitation of the respective estates of the persons named. The Court (Wylie, J.) held that it was at liberty to look at the intention of the settlor as evidenced by the whole deed. Finding in it sufficient indication of intention to that effect, the persons named were held entitled to equitable estates in fee simple. It is perhaps superfluous to point out that this is one of the matters which prove, in spite of the so-called "fusion" of law and equity, that there are still substantial distinctions between legal and

equitable estates. You cannot imply *legal* limitations in this way; a suit for the rectification of the deed would be necessary. Nor can it be done even in regard to equitable limitations, unless an intention can be found *expressed*, or sufficiently shown on the face of the deed. From the purely Irish point of view, the decision is noteworthy as a refusal to follow *Meyler* v. *Meyler* (11 L. R. Ir. 522), and a preference of *In re Tringham's Trusts* (L. R. [1904], 2 Ch. 487).

Wills v. *Wills* ([1909], 1 Ir. R. 268) is another of the unending instances of conflict in judicial opinion on the construction of a will. A testator had two classes of lands; first, settled lands, limited to himself for life, with remainder to his first and other sons in tail male, with remainder to himself in fee: and secondly, unsettled lands. Arrears of rent were due at the time of his death in respect of both. His will gave to his eldest son, absolutely, all his real and chattel real property, whether in possession, reversion, remainder, or expectancy, or over which he had power of disposition, together with all rents and arrears of rent *due thereout* at the time of his death. There was a direction that all outgoings charged thereon or payable thereout at his death should be paid out of such rents. Then followed a gift of all property not disposed of in trust for his children generally. The Master of the Rolls, and one member of the Court of Appeal, held that the gift of rent and arrears of rent to the eldest son must be confined to the unsettled lands; the other two members of the Court of Appeal held the eldest son entitled to the rents and arrears out of both the settled and unsettled lands. The principal difficulty is, of course, to find what the words "due thereout" refer to; probably the majority of the Court of Appeal were right in giving these words, occurring in so general a gift, the widest possible construction.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Laws of England. Vols. VI, VII, and VIII. By the Right Hon. the Earl of HALSBURY and other lawyers. London: Butterworth & Co. 1909.

It will no doubt be noticed that these volumes seem to appear a little prematurely, as Vol. V has not yet been issued; but this is accounted for by the delay which has been caused in the production of that volume, which is entirely devoted to Company law, by the fact of the Companies Consolidation Act not having received the Royal Assent till the 21st December last. The sixth volume only contains two headings and part of a third. They are, Compulsory Purchase of Land and Compensation; Conflict of Laws; and Constitutional History, Parts I—V. The title on Compulsory Purchase of Land and Compensation has been contributed by the Lord Chief Justice and Mr. C. E. Allan and covers about 175 pages, and is, as might be expected, a thorough compendium of the law. The attention of the Chancellor of the Exchequer might perhaps be directed to the statement that questions of considerable difficulty have arisen as to what are mines and minerals. For the title Conflict of Laws we are indebted to Sir Thomas Raleigh, Mr. Maurice L. Gwyer, Mr. W. A. Greene, and Mr. J. L. Brierly. It occupies 130 pages, and is divided into eleven parts, of which perhaps the most important is that dealing with Husband and Wife. The nature of the subject is rather a difficult one to define, and it is stated to consist "of the rules adopted by the English Courts for determining, first, the limits of their own jurisdiction in disputes which either wholly or in part arise abroad, or at least in connection with foreign transactions; and, secondly, if the matter falls within their jurisdiction, the law, whether English or foreign, which in the circumstance of the case it becomes their duty to apply." The many difficult questions connected with marriage and divorce are treated with care and caution, and it is somewhat disturbing to notice how many doubtful points there are. The last 190 pages of this volume and the first 277 pages of the seventh volume are taken up with the very important subject of Constitutional law. The contributors to this are Mr. W. S.

Holdsworth, Mr. E. Wavell Ridges, Mr. Meryon White-Winton, and Mr. A. Hildesheimer. Constitutional law is perhaps rather too wide a description of the subject matter of the title, as there are very many important Constitutional questions which are not touched on, and will have to be sought for under such titles as Parliament, etc. The present title deals mostly with the powers and position of the Crown, its relations to the Executive, and its Hereditary and Private Revenues. The rest of Volume VII is given to the two titles Contempt of Court and Contract. The former is the work of Master J. C. Fox, and the second title, which of course deals with its important subject in a somewhat general way, is contributed by Mr. H. F. Manisty, K.C., Mr. J. A. Johnston, Mr. A. Robinson, Mr. W. Bowstead, and Mr. M. R. Emanuel. Wherever we have consulted it we have found the law clearly and we believe accurately laid down. We may in passing call attention to the opinion expressed on one much-mooted point. "The question whether a letter of acceptance can be anticipated by telegram or by any other means of communication, and revoked before it reaches the person who made the offer, has never been expressly decided by the English Courts. On principle, it is submitted that a letter of acceptance which has been anticipated in this manner is not binding upon the person by whom it was sent." The eighth volume has five titles. The first of these—Copyholds—is one of considerable importance. It fills over 130 pages, and is written by Mr. A. R. Ingpen, K.C., and Mr. R. Leigh Ramsbotham. Copyright and Literary Property is by Mr. A. R. Ingpen, K.C., and Mr. Harold Hardy. Mr. J. Brooke Little has contributed the article on Coroners single-handed. Corporations is by Mr. O. L. Leigh Clare and Mr. R. Leigh Ramsbotham; and the longest article—County Courts—which covers nearly 300 pages, is contributed by His Honour Judge Woodfall and Mr. E. H. Tindal Atkinson, assisted by Mr. H. L. Ormsby, Mr. H. L. Tebbs, and Mr. S. E. Pocock. All these articles seem to us to well uphold the high standard set in the preceding volumes, and to give excellent compendiums of the law up to a remarkably recent date. For instance, in Volume VIII, which was published at the end of June last, the law is stated to be as at June 2nd. We shall look forward with much interest to the next volume, where the highly-important subject of Criminal Law and Procedure is to be treated by so competent an authority as the Common Sergeant, with other experienced lawyers.

The Rhodian Sea Law. Edited from the Manuscripts by WALTER ASHBURNER. Oxford: The Clarendon Press. 1909.

For a minute and exhaustive study like this the Author must be at once a competent Roman lawyer, and a competent Byzantine scholar. Mr. Ashburner is obviously both, and his edition will probably be the final one. The subject is an important one, as the *Lex Rhodia* is the basis of the whole modern law of jettison and general average. The work consists of an introduction, an *apparatus criticus* of manuscripts and of printed editions, from 1561 downwards, and a translation with notes. The actual text is meagre, how much so appears from the pagination (pp. ccxciii, 132). But the law acted as a rough and ready measure of justice at a time when Greek sailors were wont to steal the passengers' shirts. The regulations as to the bedding and food to be supplied to the forecastle are—except as to wine—a forecast of modern Board of Trade rules. The captain was more autocratic than at present, and could inflict severe corporal punishment, possibly even the rack, though there is some doubt as to this. He had generally some share in the adventure. Cutting the painter was a delict falling under the *Lex Aquilia.* It is interesting to note that a charter-party must have been in writing. Some unfamiliar terms are used in this strange link between ancient and modern Commercial law, *e.g.*, *columna* for a partnership; *commenda,* an advance to a trader; *mudua,* a convoy; and *cariti,* the twenty four parts into which the ownership of a vessel was divided. When the twenty-four parts became the modern sixty-four Mr. Ashburner does not inform us.

Fourth Edition. *Lely and Aggs' Agricultural Holdings.* By W. HANBURY AGGS, M.A., LL.M. London: Butterworth & Co. 1909.

Mr. Aggs treats in this work a large number of statutes affecting agriculture. These, printed at length, are some thirty-five in number, and he has certainly brought them together in a convenient form "for the use of landlords, tenants, land agents and their advisers." The two most important statutes treated on are, of course, the Agricultural Holdings Act 1908 and the Small Holdings and Allotments Act 1908, but there are many other statutes set out and explained on such subjects as Distress, Game, Wild Birds, &c. The Agricultural Holdings Act 1908 repealed, as far as regards England, the Agricultural Holdings Act 1906, the Agricultural

Holdings Act 1890, and the Agricultural Holdings Act 1883, but re-enacts and consolidates their provisions with some important alterations. Perhaps the most important of these are (1) that all questions referred to Arbitration must be determined by a single arbitrator; (2) Compensation can be received for damage caused by game. The first alteration is, as the Author points out in some detail, likely to prove unsatisfactory in many instances; and he gives a remarkable and closely reasoned note showing the great difficulties in fairly assessing the injury caused by game, and the eminent qualifications an arbitrator must possess to be able satisfactorily to do so. Mr. Aggs' notes all through are full and valuable, and we fully agree with the view that he expresses in the preface, that it is better to give a mistaken opinion than be silent on the many and important difficulties of construction which arise from this Act. Some of the difficulties he refers to arise on such questions as to what is "drainage," "permanent pasture," "can the Act be evaded?" &c. His views are always well supported by argument, but we can hardly agree with him when he says in a note to the interpretation clause that "the Court will always, in a case of doubt, adopt the construction which is most just and equitable *and most likely to prove beneficial to the tenant.*" The italics are ours. The Small Holdings and Allotments Act 1908, the other principal Act contained in this book, is also a consolidating Act and so the only one necessary to consider. The conclusion Mr. Aggs draws after summarising the Act is that "if there is a genuine demand for small holdings and allotments it is believed that a sympathetic administration of the Small Holdings and Allotments Act 1908 will bring about immense rural changes." Mr. Aggs, however, is justly severe on the provisions, that a party to an arbitration under this Act shall not, as of right, be entitled to employ counsel, and that there is no guarantee as to the standing of the arbitrator, or that he should be free of political control. This strikes us as another sign of the tendency which is now apparent in legislation to have disputed questions tried as far as possible by Government officials and not by judicial tribunals.

Fourth Edition. *The Law and Custom of the Constitution.* By Sir W. R. ANSON, Bart., D.C.L. Oxford: The Clarendon Press. 1909.

With this volume Sir William Anson completes the edition of what he modestly describes as "an introduction to the Study of

the Constitution." In his preface he refers to the great additions to the literature of the subject that have been made since these books were first written, such as the Letters of Queen Victoria and the biographies of Mr. Gladstone, Lord Granville, Sir James Graham, &c. He also refers to some valuable contributions outside our own country in the works of Mr. Porritt, Mr. Lowell, and Dr. Redlich. The main portion of the book deals with the growth of the Houses of Parliament, the qualifications for election and creation of their Members, procedure and powers of each House and their relations to each other and to the Crown. All this is accurately and adequately dealt with, and the result is a valuable book of reference for all interested in the Constitution. What, perhaps, interests a reader most at present is the opinion of the learned lawyer, politician and minister, on the present relations of the two Houses, the changed position of the House of Commons, and what may be expected in the future. The elements which Sir William Anson considers the Peers should consider when a measure is sent up to them from the Commons are (1) Does the Bill accord with the deliberate judgment of the country; (2) Has it been sufficiently considered in the House of Commons. He points out the increasing difficulty of finding out whether a Bill is acceptable to the country merely because it has been passed by a large majority in the House of Commons, elected in that "confusion of many issues"—a General Election—and now to this doubt must be added "the ever-increasing probability that it has been 'insufficiently considered.'" He treats Sir Henry Campbell-Bannerman's resolution of 1907 as simply establishing a single-chamber Constitution. He traces the growth of the Commons' contention that the Lords may not amend Money Bills, and sums up the position of the Commons that they "now regard as a breach of privilege, not merely the imposition by the Lords of any charge by way of rates or taxes, but any dealing with the regulation or administration of such a charge: and this in measures not primarily financial, but mainly concerned with social charges." The Author seems, on the whole, to approve of the recommendations for the Reform of the House of Lords issued by the Committee of that House appointed in 1907. We have not space to do more than quote Sir William Anson's opinion on the effect of the "guillotine." "The result is most unsatisfactory: important Bills are sent up to the House of Lords with important sections wholly unconsidered or perfunctorily discussed in the House of Commons,

and this, while it adds weight to the deliberations of the House of Lords and the conclusions at which the Peers arrive, detracts from the importance of the House of Commons in more ways than one. Debate in the House of Commons loses interest when it is certain that at a given moment the Government will settle the matter in the form which they have chosen; and the country shares with the House the lack of interest in discussions which have a foregone conclusion."

Fifth Edition. *Clerk and Lindsell on Torts.* By WYATT PAINE. London: Sweet & Maxwell. 1909.

A new edition of a standard work is always welcome, but we were rather surprised to see it so soon, as the last edition appeared as lately as 1906. There has been no great amount of legislation since which concerns the subject, the most important statutes being the Trades Disputes Act 1906 and the Patent and Designs Acts 1907, the latter, which consolidates the law, being treated at considerable length. The law of Distress has been considerably altered by the Law of Distress Amendment Act 1908 and the Agricultural Holdings Act 1908. Here we may call attention to a slip, remarkable in so carefully edited a book. Although the Agricultural Holdings Act is referred to in the preface, it is not included in the index of statutes nor cited in the chapter on Distress. The references in that chapter are made to the Act of 1883, which the Act of 1908 repealed and substantially re-enacted. Some important cases have been decided since the last edition, such as *Price's Patent Candle Co., Ltd.* v. *London County Council*, *Newmark* v. *National Phonograph Co.*, and most important of all, *Osborne* v. *Amalgamated Society of Railway Servants.* The whole work has been revised, and Mr. J. F. Clerk, one of the Authors of the original work, has practically re-written nearly half of the first chapter. It is worth noting that the first and last paragraphs in Chapter III, "Felonious Torts," appear practically contradictory. The first paragraph runs:—"Where an act is at once a tort and a felony or misdemeanour it is not proper that the injured party should be allowed to pursue his own private remedy in preference to furthering the ends of public justice." The last paragraph is:— "It is to be observed that there is no fetter on the right of action where the alleged tort is also a misdemeanour."

A Supplement to Lindley's Law of Partnership. By T. J. C. TOMLIN, M.A., B.C.L., and A. A. UIHWAII, B.C.L. London:

Sweet & Maxwell. 1909.—This Supplement deals with the new Limited Partnerships Act 1907 (7 Edw. VII. c. 24), and has the advantage of being written by Mr. Tomlin, one of the joint Editors of the seventh edition of *Lindley on Partnership*. In an *addenda* are given certain observations on cases decided since the issue of the seventh edition of the parent work. The Limited Partnerships Act 1907 is annotated section by section in a workmanlike and efficient manner. The forms appearing in the Appendices are complete and useful, especially the draft deed of partnership between two general partners and one limited partner. In conclusion, one may say that any law library possessing a copy of *Lindley on Partnership* will, of necessity, have to include a copy of this Supplement for the sake of uniformity and completeness.

Death Duties. By W. G. DOBSON. London: Sweet & Maxwell. 1909.—It is rather exceptional for a text-book to be produced before its time. But with the death duties under revision in the present Finance Bill, Mr. Dobson's book seems to have come a little too early. He has, however, included in Appendix form the Chancellor of the Exchequer's Speech of 29th April, 1909, which shows the alterations proposed in the scale. This book contains the Finance Acts of 1894, 1896, 1898, 1900 and 1907, in *extenso*, in its first part, while the second has ample notes on those Acts. We think that the notes might more conveniently have been printed with the text. The County Court Rules are included.

The Law of Compensation for Industrial Diseases. By E. T. H. LAWES, M.A., B.C.L. London: Stevens & Sons. 1909.—We think that the Author rather exaggerates when he speaks of the extension of Workmen's Compensation to Industrial Diseases as creating a new branch of the law. But many questions of importance may well arise out of the extension, and there is therefore justification for a book dealing exclusively with the subject. The book is divided into two Parts. The first contains an Introduction showing the gradual course of the law to its present state, by way of *Brinton's, Ltd.*, v. *Turvey*, and *Steel* v. *Cammell Laird & Co.*, to the Act of 1906. The Introduction also sets out the general scope of the Act. The first Part further contains the section concerned (section 8), very fully annotated. We think Mr. Lawes has been well advised not to quote many County Court cases, it being, as he

points out, hard to obtain reliable reports. Part II contains a Treatise on the diseases included in the Third Schedule and subsequent orders. This should be an especially useful part of the book.

A Complete Guide to Solicitors' County Court Costs. By S. FREEMAN. London: Butterworth & Co. 1909.—This is, as Mr. Freeman styles it, a "Complete Guide," and seems to exhaust every item that can be included in County Court costs, with all the enactments, rules and cases decided on such costs. The arrangement of the scales of costs is mostly chronological, and the Appendices contain a large number of "various circumstances and special cases," and also various rules and regulations under Acts of Parliament, etc. It seems to be a most useful work of reference for the solicitor when engaged in the agreeable occupation of making out his bill of costs.

The Annual Statutes, 1908. By W. H. AGGS, M.A. London: Sweet & Maxwell. 1909.—Owing to the prolongation of the Autumn Session this volume appeared later in the year than is customary. It is, however, double the size of any of its annual predecessors, this sudden increase in bulk being due to the unusual number of consolidating Acts passed last year. Chief among these, of course, is the Companies Act, which—with its 300 sections and its schedules—takes up over one-fourth of the book. Other consolidating Acts are the Small Holdings and Allotments, Agricultural Holdings, Post Office Consolidation, and Costs of Criminal Cases Acts. The Port of London Act, the Old Age Pensions Act and the Children Act, are also important enactments of a very fruitful legislative year. Further, the Friendly Societies Act of 1896, with all the alterations and amendments introduced into it by the Act of 1908, is included, together with the amending Act itself. As regards the marginal notes, Mr. Aggs is a worthy successor to Mr. Lely—more could not be said.

The Law concerning Secondary and Preparatory Schools. By A. H. H. MACLEAN. London: Jordan & Sons. 1909.—This is a decidedly useful and at the same time an interesting book. The question is often asked, "What is a Public School?" and it appears that seven great schools—Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby and Shrewsbury—have been so treated by the Legislature that it might be claimed that the term was limited to them. The first three enjoy the privilege of perpetual copyright in

their educational books, and are exempted from Land Tax and other impositions. But apart from its incidental interest, the book is certain to be serviceable. It covers a wide range, and within it will be found a comprehensive treatise on the law affecting Secondary Schools. There are chapters on the Establishment of Secondary Schools, the Enactments affecting them, Mortmain, the Board of Education, Local Authorities, Trustees, Schoolmasters, Pupils, &c. The case-law appears complete, and all the necessary Statutes and Regulations are given.

County Council Licences. By T. HYNES, LL.B., and T. JAMESON. London: Butterworth & Co. 1909.

Second Edition. *Local Taxation Licences.* By Sir N. J. HIGHMORE. London: Stevens & Sons. 1909.—Although provision was made more than twenty years ago—by the Local Government Act, 1888—for the transfer of the power of the Inland Revenue Commissioners to levy the dog, establishment, game and gun licence duties, it was not until after the passing of the Finance Act 1908, and a consequent Order in Council, that the transfer came into operation. A complete change in the machinery for the collection of the dues concerned has now taken place, and it may be that some confusion exists among the authorities touched. To all such these books will be of use. As far as we can judge both are well compiled and produced, and contain the latest case-law. As an instance we may note *Whiteley* v. *Burns*, the important decision affecting male servants in a "living-in" establishment.

Second Edition. *Leake's Law of Property in Land.* By A. E. RANDALL. London: Stevens & Sons. 1909.—The original edition of this book was something in the nature of an attempt at codification of Real Property law. Mr. Randall's revision has materially assisted in bringing Mr. Leake's work to a nearer realisation of that object. The scheme of the work has been preserved, but much of the matter is new, and much of the old is re-arranged. The book is divided into two parts, viz.: "Sources of the Law," and "Estates in Land." The first part deals with the historical side of the subject, the second being sub-divided into the limitations as to Quantity and the limitations of Future Estates. Some 2,500 cases are referred to, and the book should prove a useful analysis for advanced students and the profession.

CONTEMPORARY FOREIGN LITERATURE.

La Bulgarie et le Traité de Berlin. By Dr. ALBERT CALEB. Geneva: 1909.

A political rather than a legal treatise, and a powerful argument for the establishment of the kingdom of Bulgaria being no breach of the Bulgarian clauses of the treaty of 1878. The doctrine of *clausa rebus sic stantibus* applies, and the position of Bulgaria is not the same as in 1878.

Dr. ALDO BALDASSARI. Rome: 1909. Reprints with notes of two judgments, one of the Court of Cassation and one of the Civil Tribunal of Rome, as to recognition of foreign divorce, and as to penalties for adultery committed abroad.

Los Supuestos filosóficos de la Noción de Derecho. By G. DEL VECCHIO, traslated by M. CASTAÑO. Madrid: 1908. The only original part is a short introduction by Señor M. Castaño. The Italian work has already been noticed in these columns.

Das Budget—Privileg des Hauses der Gemeinen. By Dr. STANISLAUS SUSSMEN. Mannheim: 1909.

This learned and exhaustive study in English Constitutional law appears at an opportune moment. The Author seems to have consulted all available authorities, and his conclusion is in favour of what may be called the House of Commons contention. For a storehouse of facts and arguments, the book may be recommended to those who wish to take a calm view of the question at issue apart from the heat of political controversy.

PERIODICALS.

Deutsche Juristen-Zeitung. Berlin: 1 July—15 August, 1909.—The main interest of these numbers is the fine illustrated volume in celebration of the 500th anniversary *Jubiläum* of the University of Leipsic. Law occupies a large share in the volume, for Leipsic has always taken a leading part in the legal study and practice of the Empire. Some eminent jurists connected with the university contribute autobiographical notes on their rise and success. Of these the best known in England are Rudolph Sohm and Ludwig Mitteis. It is remarkable that in a student-song written to celebrate the foundation in 1409 the name of Wycliff appears, Bohemia being at that time torn by religious controversy, and Wenceslaus being the founder. The line is—

Getznitz, Wicleff, jurium magnum fundatorem.

Getznitz or Jesnicz was a celebrated jurist, and it is strange to see Wycliff coupled with him in that capacity.

La Giustizia Penale. Rome: 17 June—19 August.—For the purposes of extradition a political offence includes not only a direct or indirect attack on the security of the State, but also substitution in the conscription whereby a citizen escapes his military service (p. 789). A verdict of a jury is legally valid, even though the answers given to the questions put by the judge are not stated to be the finding of a majority (p. 790). In a question whether an accused person be of sound mind, the point for the jury is, whether he were at the time of the unlawful act in such a state of mental infirmity as to have lost *la coscienza o la libertà dei propri atti.* The finding of one of these alternatives will be sufficient for acquittal (p. 1016).

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to want of space:—*Pratt's Law of Friendly Societies;* Marcy and Simpkin's *Forms of Originating Summons;* Thwaites' *Student's Procedure and Evidence* and *Student's Guide to the Principles of Common Law;* Emery's *Solicitor's Patent Practice; Daniel's Law of Distress;* Maitland's *Equity;* Halsbury's *Laws of England, Vol. 9;* Piggott's *Foreign Judgments, Part II;* Chaster's *Law of Public Officers;* Baty's *International Law;* Oppenheim's *International Incidents; Yearly Practice of the Supreme Court; Annual Practice* and *A. B. C. Guide; Key and Elphinstone's Conveyancing;* Lynn's *Workmen's Compensation;* Johnston's *Agricultural Holdings;* Elliott's *Workmen's Compensation; Terrell on Patents;* Strahan's *Law of Mortgages; The Legislation of the Empire; Carver's Carriage by Sea;* Easton's *Law of Rent-Charges;* Holland's *Letters upon War and Neutrality;* Phillipson's *Effect of War on Contracts.*

Other publications received:—Whittuck's *International Documents—Appendix;* McKitrick's *Accident Insurance for Working Men* (Wisconsin Library Commission); *Higher Education—Law* (New York Education Department, Albany); *Butterworth's Quarterly Digest;* Engleman's *Law Clerk's vade mecum.*

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review, Law Times, Law Journal, Justice of the Peace; Law Quarterly Review, Irish Law Times, Australian Law Times, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer* (India), *South African Law Journal.*

THE

LAW MAGAZINE AND REVIEW.

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I.—THE ORATORY OF LORD ERSKINE.

THE greatest advocate that ever practised at the English Bar was undoubtedly Thomas Erskine. As a man, he had many faults. As a legislator, he was a failure. As Chancellor, he was so unreliable that his decisions received the nickname of the *Apocrypha*. "Only the youngest members of the profession," says Sir Frederick Pollock, "need be warned that Erskine's Equity has never been valued at the same rate as his eloquence." But, whatever his failings in Parliament, or as a judge, he was, as Lord Campbell has said, "without an equal in ancient or modern times as an advocate in the forum." It was not that he was remarkable for oratory only. He gained his reputation for eloquence, as used for and bent to the purposes of advocacy. He never lost sight of the business in hand—the client—the case—the verdict. Under all his brilliant speech was the hard head of the *nisi prius* lawyer. His fame was built, as Brougham has said, on the matchless skill with which he could subdue the genius of a first-rate orator to the uses of the most consummate advocate of the age.

After serving first in the navy and then in the army, Erskine was called to the Bar in 1778 at the age of twenty-eight. He had been a keen student of English literature. He had relieved the monotony of military life by devotion to Shakespeare, Milton, Dryden, and Pope. He had

mastered the resources of language. It was said that he knew *Paradise Lost* and *Paradise Regained* by heart. When his chance came in the case of Captain Baillie, he was ready to take the fullest advantage of it. It was not his weary lot to sit on the back benches of the Courts among the young men, who may be not inaptly compared to the ghosts that linger on the banks of the Styx for a passage over the lake. He quickly attained success and reputation.

Erskine's first client was the Captain Baillie, who has just been mentioned. Baillie was Lieutenant-Governor of Greenwich Hospital, and had exposed certain abuses in the management of the Hospital. His conduct was resented by Lord Sandwich, the First Lord of the Admiralty, on whom he had reflected severely, and proceedings were taken against him for a criminal libel. Erskine happened to visit Wellbore Ellis when Baillie was dining there, and, ignorant of his presence, inveighed against the conduct of Lord Sandwich. Baillie learning that Erskine had himself been at sea, sent him a retainer next day. When the case was tried, three of the counsel retained by Baillie advised a compromise, but Erskine resisted the proposal. When Erskine's turn came to speak he made so fierce an onslaught that, although perfectly irregular, it carried the day. Jekyll came into Court in the middle of the speech and found the Court, judges and all, "in a trance of amazement." Erskine always said that this speech put him on his feet at once. His experience was like that of Cicero, when he defended Roscius Amerinus. It gave him such a position as an advocate, "*ut non ulla (causa) esset, quae non digna nostro patrocinio videretur.*" He was considered good enough to appear in any cause.

Erskine is the only English lawyer whose speeches as an advocate have secured a permanent place in the literature of oratory. He lived in the golden age of English eloquence.

As it was said by the historian Paterculus that only in the lifetime of Cicero was there any great eloquence in Rome, so it has been said that no member of either House of Parliament will be ranked among the orators whom Lord North did not see, or who did not see Lord North. Erskine belonged to the group that had seen Lord North. His place among the orators is secure. In the early years of leisure which fall to the lot of most young men at the Bar, no better employment could be followed than a careful study of Erskine's speeches. It is not enough to read them once. They should be read and re-read and analysed. His defences were, as Mr. Richard Harris, K.C., says in his well-known *Hints on Advocacy*, "artistic in the truest sense." "The mode, the art, of presenting the case," says Mr. Harris, "was more even than the matchless eloquence by which it was accompanied."

Eloquent and effective as Erskine's defences were, they have characteristics which a modern advocate would avoid. The personal element is a prominent feature. Erskine was nothing if not vain. He was nicknamed Counsellor Ego, and, when he was raised to the peerage, it was suggested that he should take the title of Baron Ego of Eye, in the county of Suffolk. He appears never to have felt any necessity for suppressing his own personality. At times his vanity becomes slightly absurd. In the speech for Thomas Walker and others, for example, he says he has no interest in the destruction of the constitution, and he gives a Harcourtian reason. "I have the honour to be allied to His Majesty in blood," he says, "and my family has been for centuries a part of what is now called the aristocracy of the country; I can therefore have no interest in the destruction of the constitution." He constantly expresses his own belief in the innocence of his clients—a course which no good advocate, who knows his business, would now think of adopting. "If an advocate," he says in his speech for

Thomas Paine, "entertains sentiments injurious to the defence he is engaged in, he is not only justified, but bound in duty to conceal them; so, on the other hand, if his own genuine sentiments, or anything connected with his character or situation, can add strength to his professional assistance, he is bound to throw them into the scale." This view, however, is no longer held by English lawyers.[1]

Erskine in his defences expresses his own opinions on all sorts of highly controversial subjects with the utmost boldness. He never hesitates to vent his political and religious views. Some of his speeches are pure and undiluted political addresses. His speech to the jury in the *Perry and Lambert Case* is simply a defence of Whiggism. He had the greatest admiration for the writings of Burke. "The most common subjects," he says, "swell into eloquence under the touch of his sublime genius." He constantly quotes from his political works. It is said that he read and re-read Burke's speech against Warren Hastings until he knew it by heart. But we do not find in his speeches those eloquent statements of political first principles, in which Burke's orations are so rich. Here and there we find an epigrammatic passage, but they are few and far between. A single instance may be cited. "When men," he says in one place, "can freely communicate their thoughts and their sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface; but, pent up by terrors, they work unseen, burst forth in a moment, and destroy everything in their course. Let reason be opposed to reason, and argument to argument, and every good government will be safe."

[1] Quintilian (*Institutes*, Bk. xi, c. 1, s. 3) condemns this practice. "They likewise are arrogant," he says, "who are peremptory in asserting the goodness of their cause, and that if it were not such, they would not have undertaken it. The judges, indeed, cannot bear to hear one presuming to exercise their function." Perhaps the last instance in England in which an advocate of prominence avowed his personal belief in his client's innocence was in the Rugeley poisoning case, when Serjeant Shee stated his belief that Palmer was innocent.

In some of his political defences, he gives long extracts from the writings of others. The speech for Thomas Paine may be taken as an illustration of this statement. Paine was prosecuted for writing a book in reply to Burke, in which he upheld the right of the people to change their government, if they thought proper. Erskine in his defence showed that the views of Paine were identical with those of Paley, Locke, David Hume, and even Burke himself, and quoted freely from those writers. He argued that Paine had a right to express them. He quoted Milton, Hume, Dr. Johnson, Stanhope, and Lord Loughborough, in support of the Freedom of the Press. Going through the various passages selected by the Information as seditious, he endorsed or explained them away, quoting in support of Paine's views Hume, Mr. Cappe, "a late eminent and pious minister at York," Burke himself, and Pitt. He turned aside to defend Harrington, the author of *Oceana*, who had in a recent pamphlet been coupled with Paine, the two being described as obscure blackguards. He quoted an extract from Milton, containing the fine passage, which begins, "Methinks I see in my mind a noble and puissant nation rousing herself like a strong man after sleep." He uttered a panegyric of Mr. Fox, and concluded with a reference to Lucian's fable of Jupiter and the countryman.

The finest speech of Erskine was his defence of Stockdale. If it has a fault, it is that it is too fervid and ornate. It may be said of it, *abundat dulcibus vitiis*. Brougham greatly admired a passage in the speech, which may be quoted as a sample of Erskine's florid eloquence. Brougham ascribed the beauty of the passage to its rhythm, and pointed out that it was in iambics.

"Gentlemen, you are touched by this way of considering the subject, and I can "account for it. I have been talking of man and his nature, not as they are seen "through the cold medium of books, but as I have myself seen them in climes "reluctantly submitting to our authority. I have seen an indignant savage chief "surrounded by his subjects, and holding in his hand a bundle of sticks, the notes

"of his unlettered eloquence. 'Who is it,' said the jealous ruler of the forest, "encroached upon by the restless foot of English adventure, 'Who is it that "'causes these mountains to lift up their lofty head? Who raises the winds of the "'winter, and calms them again in the summer? The same Being who gave you "'a country on your side of the water, and ours to us on this.'"[1]

Erskine was indebted to nature for a singularly sweet and flexible voice. Plutarch, in his enumeration of the ten Greek orators, is careful to mention their excellent voices, and the pains bestowed by some of them in training them. Erskine had a charm of voice which in itself enchained attention, and which was adequate to any emergency. Like other great orators of ancient and modern times, he went to the stage for lessons in elocution. Demosthenes studied delivery under the comedian Satyrus. Cicero studied under the comic actor Roscius and the tragedian Æsopus. Gambetta studied under the famous Coquelin. Erskine found his model in Mrs. Siddons, whose cadences and intonations he carefully noted. He once said that he was indebted for his best displays to the harmony of her periods and pronunciation.

Erskine was an unflinching upholder of the dignity and integrity of the Bar. There is a fine passage in his speech for Thomas Paine, too long to quote, in which he enlarges upon the duty of an advocate. He was much attacked for undertaking the defence of Paine, and he justifies his action in unhesitating language. "Little indeed did they know me, who thought that such calumnies would influence my conduct. I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence." This passage recalls the boldness of another great advocate, Cicero, who,

[1] This famous passage is differently given in different works. The above version is from the chapter on Erskine in *Public Characters of 1799—1800*, published in London in 1799.

The other quotations in the article are from *Speeches by Thomas Lord Erskine, with a Memoir by Edward Walford, 1880.*

in his speech for Roscius Amerinus, gives utterance to words worthy to be placed beside those of Erskine. The opponent of Roscius was supported by very powerful friends, and Cicero says that perhaps he acted rashly under the impulse of youth in undertaking the defence. But having once undertaken it, no terror or danger would keep him from standing by his client. One occasion, on which Erskine refused to allow Mr. Justice Buller to browbeat him, is famous. "Sit down, Sir," said Mr. Justice Buller. "Remember your duty, or I shall be obliged to proceed in another manner." Erskine retorted, "Your Lordship may proceed in what manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct."

Erskine, like Cicero, found that boldness in the performance of his duty paid in the end. Cicero told his son that the surest way to attain reputation and favour as an advocate was to undertake the defence of those who were oppressed or overborne by the influence of powerful opponents, as Cicero himself had done in the case of Roscius Amerinus. Erskine's experience was the same, and with the passage in which he says so this article may fitly be concluded:—

"It was the first command and counsel of my youth always to do what my "conscience told me to be my duty; and to leave the consequences to God. I "shall carry with me the memory, and, I hope, the practice of this parental "lesson to the grave. I have hitherto followed it, and have no reason to com-"plain that the adherence to it has been even a temporal sacrifice. I have found "it, on the contrary, the road to prosperity and wealth; and shall point it out as "such to my children."

J. A. LOVAT-FRASER.

II.—THE LAW OF THE UNIVERSITIES.

V. DISCIPLINE.

THE disciplinary powers of the universities extend over graduates, undergraduates, and non-members. As to graduates, by the Oxford statutes of 1882, framed under the powers of the Act of 1877, a visitatorial board has been constituted consisting of the Vice-Chancellor and six other graduates. It has disciplinary authority over professors, readers, and other university officers, and may deprive, suspend, or admonish for grave misconduct, neglect of duties, or wilful disobedience of statutes of the university. There is no similar board at Cambridge, but an analogous jurisdiction is exercised by the Vice-Chancellor and the *Sex Viri* (elected by the Senate) for the trial of graduates.[1] Another remedy for offences committed by graduates is degradation or deprivation of degrees by the university itself.[2] The principal disciplinary officers over those *in statu pupillari* are the two proctors[3] and the four pro-proctors, whose powers are based partly on 31 Hen. VIII, c. 10, partly on statutes of the universities. The whipping of old times has long ceased and so have some of the old offences, such as poaching at Shotover or Woodstock. The usual punishments now are fine, "gating," rustication, and expulsion.[4] For graver offences the magisterial powers of

[1] There is an appeal from this body to the Senate, but apparently none from the visitatorial board.

[2] The best-known cases are those of Bentley in 1718, and of W. G. Ward, a Fellow of Balliol, during the Tractarian controversy. In 1896 a M.B. of Caius was deprived of his degree by the *Sex Viri* after a sentence of penal servitude (*Guardian*, 21 Nov. 1896).

[3] The original authority of the proctors included, among other curious matters, jurisdiction against those who paid their tailors more than the statutory allowance. They had also practically unlimited powers against those *suspectos qualitercunque*. See Wood, *Fasti Oxonienses*, 3.

[4] In one case it was held that a man might be expelled from the university without being expelled from his college (*R.* v. *Chancellor of Cambridge* [1784], 6 T. R. 89). The offence was writing a pamphlet against the Established Church, and the tribunal was the Vice-Chancellor and heads of houses in the Chancellor's Court. It is difficult to suppose that this decision would be followed now, unless in the case of an unattached student.

the Vice-Chancellor would be invoked. By the Municipal Corporations Act, 1882, the Vice-Chancellor of Cambridge may sit as a borough justice at Cambridge. He is also president of the Court of Discipline (six heads of houses), for the trial of offences committed by those *in statu pupillari*. He may also hold a court under the Cambridge University and Corporation Act, 1894. At Oxford the Chancellor and Vice-Chancellor were by the charter of 14 Hen. VIII justices for the City of Oxford and the counties of Oxford and Berks. In 1886 a new court of summary jurisdiction was established by the Oxford University (Justices) Act, 1886, (49 & 50 Vict., c. 31), by which a place may be fixed within the precincts of the university where the Chancellor and his commissary (the Vice-Chancellor), and the deputy of the latter, may sit as justices for the counties of Oxford and Berks, and any justice for Oxford and Berks may sit with him.[1] For the graver crimes the Court of the High Steward, dating from 1406, still nominally has jurisdiction to try a member of the university, graduate or undergraduate, for treason, felony, or mayhem. A true bill must be found at assizes and removed by *certiorari* to the university court, and half the jury must consist of matriculated persons. The court may now be considered obsolete. Even in Blackstone's time there had been no trial for over a century. High Stewards and Deputy High Stewards are still appointed by both universities, but the office is an absolute sinecure. In one case there is a vicarious responsibility for offences. The Act 28 Geo. III, c. 64, provided for paving and

[1] Probably a mandamus would not lie to review the decision of a disciplinary authority. It was refused to restore a fellow of New College who had been deprived as being "guilty of enormous crimes" (*Appleford's Case* [1672], 1 Mod. 82). In the case of Widdrington, a fellow of Christ's, who had been deprived as "peccant," the King's Bench refused a writ of restitution. Later he brought an action on the case against the Master, the matter was referred to certain commissioners, he was restored, and the proceedings were "buried in oblivion" (*Widdrington's Case* [1663], T. Raym., 31, 68).

lighting Cambridge. By sect. 74 of the Act (amended by 34 Geo. III, c. 104, s. 21), if any matriculated person break or damage one of the lamps set up under the powers of the Act, he is liable to pay for the damage; if he refuse to do so, "the tutor of the college of which the offender is a member shall be answerable for the same." Some curiosities are contained in railway Acts. By 6 & 7 Vict., c. x, proctors, pro-proctors, heads of houses, and the marshal of the university are to have access to the Great Western railway station, and the company are not to convey as a passenger any member of the university under the degree of M.A., when the company shall be requested by an officer of the university not to convey him. No such provision occurs in the London and North Western Company's Act, but a similar clause is contained in the Acts dealing with Cambridge railway station (7 & 8 Vict., c. lxii, 9 & 10 Vict., c. clxxii). In addition to these powers of the university the colleges have their own modes of enforcing discipline, so that every undergraduate is subject to two jurisdictions. If rules of discipline be reasonable, the Courts will not interfere.[1]

Of powers of university officers in the case of non-members, the most important are those over "common prostitutes and night-walkers," over places of amusement, and over citizens. The former class of power depended at one time on charter, but has in more modern times been the subject of imperial legislation. 6 Geo. IV, c. 97, applies to both universities as to appointment of constables. Under this Act the Chancellor and Vice-Chancellor may appoint constables.[2] At Oxford, any woman of the description mentioned, found wandering and not giving a satisfactory account of herself, is to be deemed an idle and disorderly

[1] *Green* v. *Peterhouse*, Appendix.

[2] The proctor's constables are not entitled to claim conusance in an action for trespass, *Turner* v. *Bates* [1847], 10 Q. B. 292.

person within the Vagrant Act, 5 Geo. IV, c. 83. Further provisions were made as to Oxford by the Oxford Police Act 1881 (44 & 45 Vict., c. xxxix), as to Cambridge by the Cambridge University and Corporation Act, 1894, (57 & 58 Vict., c. lx), which extended to Cambridge the powers over idle and disorderly persons given by 6 Geo. IV, c. 97. The latter Act was passed in consequence of a case which occurred in 1891.[1] It put an end to imprisonment of women by committal by the Vice-Chancellor on unsworn evidence not given in open court. As to amusements, especially theatrical performances, there is a good deal of legislation. It is remarkable that the universities, once possessing unusual dramatic privileges, should not only have lost those privileges but have become subject to special disabilities.[2] In the sixteenth and seventeenth centuries the universities and Inns of Court were considered as privileged places, not subject to dramatic censorship. Many well-known dramas were acted at Oxford and Cambridge, sometimes for the first time. The acting of plays at the universities seems to have been for the first time forbidden in 1737 by the statute 10 Geo. II, c. 19, passed immediately before Walpole's Theatre Act, 10 Geo. II, c. 28. Both these Acts are repealed. The

[1] *R.* v. *Vice-Chancellor of Cambridge*, Appendix. The power of the university to visit and enter houses of the citizens in search of suspected persons appears still to exist, but the limits of its exercise are uncertain.

[2] Early statutes were inconsistent. For instance, some college statutes prohibited *inhonesta spectacula*, 2 Rashdall, 617. On the other hand, a statute of Queens' went as far as to punish with expulsion any student refusing to act or absenting himself from a performance. Instances of the drama at the universities were Still's *Gammer Gurton's Needle* at Christ's (1575), *Club Law* at Clare (1599—1600), *Narcissus* at St. John's, Oxford (1602), Daniel's *Queen's Arcadia* at Christ Church (1605), and in the heat of political disturbance Cowley's *Guardian*, at Trinity, Cambridge (1641). These are only examples, there are numerous others, and there are frequent allusions in contemporary literature to the drama in colleges, *e.g.*, in Ben Jonson's *Volpone*. Even chapels were not spared; it is said that in 1564 Queen Elizabeth was present at the performance of Plautus in the chapel of King's. In Charles II's reign the performance of stage plays was limited to Epiphany (when undergraduates acted in college), and to the Encænia (when a London company acted in the yard of an inn).

Theatres Act, 1843, (6 & 7 Vict., c. 68, s. 10), now provides that the licence of magistrates for a theatre within the precincts[1] of the universities of Oxford and Cambridge, or within fourteen miles of the city of Oxford or town of Cambridge, should not be in force without the consent of the Chancellor or Vice-Chancellor. As to Cambridge, the Act of 1843 is repealed, and the powers of the University now depend on the Cambridge Award Act, 1856, and the Cambridge University and Corporation Act, 1894.[2] By these Acts the proctors may enter any premises kept or used for public entertainment. The County Council may revoke any licence for the public performance of stage plays on the complaint in writing of the Vice-Chancellor or the Mayor. No occasional public exhibition or performance, whether strictly theatrical or not, other than performances in theatres which are regulated by the Act of 1843, shall take place unless with the consent in writing of the Mayor. The Oxford Police Act, 1881, (44 & 45 Vict., c. xxxix) is in similar terms, the main difference being that the Vice-Chancellor has an initial veto, not merely complaint after a play has appeared. During the "long" and Christmas vacations the consent in writing of the Mayor is sufficient. The last kind of jurisdiction over non-members is discommoning, *i.e.*, forbidding someone, generally a tradesman, from dealing with members of a university or college. It has become almost obsolete at Oxford, but is still in use at Cambridge. It is recognised by the Cambridge Award Act, 1856. It seems to be at the discretion of the authorities, and in most reported cases[3] the tradesman took nothing

[1] A radius of one and a-half miles from Carfax at Oxford; two and a-half miles from St. Mary's Church at Cambridge.

[2] See an article by Mr. F. H. Cripps-Day on Cambridge university jurisdiction, *Law Magazine and Review*, Aug., 1894.

[3] A university has power to issue a decree, and enforce it by discommoning, that a debt of £5 contracted by an undergraduate must be reported by the creditor to the college, *Ex parte Death* [1840], 12 A. & E. 647. Discommoning was admitted as a remedy in *In re University of Oxford and Taylor* [1841], 1 Q. B. 952,

by his appeal to the courts. Disciplinary provisions are contained in the present university statutes and in most college statutes. Offences against university or college statutes, not being against the King's peace, cannot be pardoned by the King.

VI. Education.

By the Board of Education Act, 1899, the universities are entitled to be represented on the consultative committee of the Board of Education. Apart from this provision, the numerous Education Acts do not affect the universities. Special provisions are made as to the authorities charged with the admission to the medical and legal professions. The privilege of university graduates of exemption from the bishop's licence, and afterwards from admission by the Royal College of Physicians, was confirmed by 3 Hen. VIII, c. 11, and 14 & 15 Hen. VIII, c. 5. A letter of Charles II, directing the College of Physicians not to admit any one to practise other than graduates of Oxford and Cambridge, was disregarded as unconstitutional in the argument of a case in the eighteenth century.[1] The provisions of the statutes of Henry VIII must now be read subject to the Medical Acts, the latest of which is the Medical Act 1886, under which the universities are represented by one member each on the General Medical Council, which is entitled to secure by inspection the maintenance of a standard of efficiency in the medical examinations of the universities.[2] As to solicitors, by 23 & 24 Vict., c. 127, and 40 & 41 Vict.,

but a prohibition issued to the Duke of Wellington, where as Chancellor he had ordered payment of costs or arrest in default. It is implied in the words of the Oxford statute, xxi, 1, 1, *commercio cum scholaribus et personis privilegiatis interdicto.*

[1] *R.* v. *College of Physicians* [1797], 7 T. R. 282.

[2] Licences to practise medicine and surgery are still nominally competent to the universities but are not granted. Forms will be found in the Oxford Statutes, ix, 7, 1.

c. 25, a person who has taken the degree of Bachelor of Arts or Bachelor of Laws may be admitted a solicitor after three years' service as an articled clerk,[1] and after four years' service if he have passed certain university examinations. By 57 Vict., c. 9, a law degree, or a certificate of having passed the examinations necessary for it, exempts from the intermediate examination. Call to the Bar does not depend on statute like the admission of solicitors. Students of the Inns of Court are by the Consolidated Regulations entitled to keep only three days a term if they are members of a university, and those who have passed the examination for the B.C.L. degree are relieved from part of the examination, as are also those who have passed any university degree examination in which Roman law is a qualifying subject. With regard to lectures, 39 Geo. III, c. 69, prohibiting the delivery of lectures in unlicensed premises, did not apply to lectures in the universities. This Act is now repealed, and the matter is regulated by 5 & 6 Will. IV, c. 65. The Act forbids the publication of lectures except by the lecturers or their assigns, but its provisions do not apply to lectures delivered in a university or college.[2] The position of a college lecturer is a little doubtful. The general rule is to give a term's notice on either side of termination of the engagement. But if one may argue from a recent endowed school case, it might possibly not be necessary on the part of the college. At the same time it should be noticed that this case proceeds on statutory authority, the Endowed Schools Act 1869.[3]

[1] It appears from *Ex parte Stewart*, [1872], L. R., 7 Exch. 202, that the degree must have been actually taken. It is not enough that the clerk is in the same position with regard to university privileges as if he had taken the degree.

[2] The plaintiff delivered from memory a lecture at the Working Men's College. The defendant attended the lecture and took shorthand notes, which he published in shorthand in *The Phonographic Lecturer*. Kay, J., held that the Common law applied and an injunction was granted (*Nicols* v. *Pitman*, [1884], 26 Ch. D. 374). The later case of *Caird* v. *Sime* is set out in the Appendix.

[3] *Wright* v. *Marquess of Zetland*, L. R. [1908], 1 K. B. 63. The point of the decision was, that no custom could prevail against a scheme framed by the Charity

Several Acts of Parliament affect professorships and scholarships. The statute 18 & 19 Vict., c. 36, provided for the salaries of certain scientific professors at Oxford. By the Act of 1862, which empowered the Vice-Chancellor to make rules of procedure for his Court, (25 & 26 Vict., c. 26), provision was made as to new professorships of scientific subjects, and as to certain university scholarships. The original preference of founder's kin in the election to the Craven scholarships at Oxford was removed by 23 & 24 Vict., c. 91. Oxford was empowered by 28 & 29 Vict., c. 55, to make statutes as to the Vinerian foundation for the teaching and study of law. In both universities up to 1868 undergraduates were required to be members of a college or hall. The admission of undergraduates not members of a college or hall was recommended as a fit subject for legislation by a committee of the House of Commons in 1868, but the proposed bill was never passed, and the admission of unattached students depends on university and not imperial statute. Both universities provide for the licensing of private halls or hostels owned by members of Convocation. The right of appointment of the head and other masterships in schools has now been superseded by schemes framed under the Public Schools Act, 1868, and the Endowed Schools Act, 1869. Among such rights formerly existing were those of Christ Church and Trinity, Cambridge, alternately to Westminster; Corpus, Oxford, to Manchester; St. John's, Cambridge, to Shrewsbury,[1] and New College to Bedford.[2]

Commissioners. As far as regards masters in endowed schools, the law has now been amended by the Endowed Schools (Masters) Act, 1908. But the principle of the case might possibly still apply in the case of a college lecturer.

[1] The right was originally in the Corporation of Shrewsbury, but delegated to St. John's. After 250 years the delegation was held valid as long as the college should nominate a fit person (*Mayor of Shrewsbury* v. *A.-G.* [1726], 2 Bro. P. C. 402).

[2] See *A.-G.* v. *Corporation of Bedford* [1754], 2 Ves. Sen. 505.

An interesting case, perhaps somewhat remotely connected with university education, is one which came before the Court of Arches in 1877. It was a suit of *duplex querela*, arising out of the refusal of the Bishop of Oxford to institute the promovent to the rectory of Drayton Parslow in Bucks. The responsive plea of the bishop was that the archdeacon had examined the promovent and found him *minus sufficiens in literatura*. The promovent relied on the fact that over thirty years previously he had composed a Latin sermon to the satisfaction of the Regius Professor of Divinity at Oxford, and had had the degree of D.D. conferred on him by that university. No final judgment was delivered by Lord Penzance, and further proceedings were put an end to by the death of the promovent.[1]

VII. Finance.

At Common law universities and colleges were allowed to do pretty much as they pleased with their property, free from the interference of the legislature and the courts, unless where a trust was imposed. Some of their old liberty still remains in their exemption from the Mortmain Acts (*see* next chapter). In other directions they have been restrained. Most of the early Acts deal with leasing. The Acts 13 Eliz., c. 10, and 18 Eliz., cc. 6 & 11,[2] avoided all leases made by colleges other than those made for twenty-one years or three lives;[3] but the Acts did not make leases

[1] *Willis* v. *Bishop of Oxford*, [1877], 2 P. D. 192.

[2] They were restrictions on the Common law by which corporations aggregate could lease "without limitation or stint." Co. Litt. 44a. 13 Eliz., c. 10, is a private Act, and must be pleaded (*Carter's Case*, [1590], 1 Leon. 306). It applies to all eleemosynary corporations (*Magdalen Hospital* v. *Knotts* [1879], 4 A. C. 324).

[3] The Crown is bound by 13 Eliz., c. 10, therefore leases to the Crown contrary to the Act are void (*Case of Ecclesiastical Persons*, [1601], 5 Rep. 14). So are grants to the Crown, the Crown to grant to the intended purchaser (*Magdalene College Case*, [1614], 11 Rep. 66). From that date up to the Act of 1858 a private Act was necessary for the sale of university or college estates.

by a college for such a term good if it were more than was limited by the college statutes. The statute 14 Eliz., c. 11, extended the term to forty years in certain cases. By 18 Eliz., c. 6, (confirmed by 39 & 40 Geo. III, c. 41), one-third of the rent was to be reserved in corn. These Acts are generally known as "the Disabling Acts." Most of them are still nominally law, but later legislation has rendered them obsolete in practice. By 5 & 6 Vict., c. 14, power is given to the universities to appoint and remove inspectors of the corn returns on which the few existing corn rents are based. At present they are estimated on the certificate of the Board of Agriculture and Fisheries. The provisions of the Lands Clauses Acts, 1845, were, by 20 & 21 Vict., c. 25, applied to university and college property within a mile and a half of Carfax, where new buildings, etc., were required. The Ecclesiastical Leasing Acts exempt colleges from their provisions. The principal Acts now affecting the property of universities and colleges are the University and Colleges Estates Acts 1858 to 1880, and 1898,[1] (21 & 22 Vict., c. 44; 23 & 24 Vict., c. 59; 43 & 44 Vict., c. 46; 61 & 62 Vict., c. 55). The main provisions of these Acts are that the universities of Oxford, Cambridge, and Durham, the colleges of those universities and Winchester and Eton are empowered to sell,[2] enfranchise,[3] mortgage, exchange, partition, and lease,[4] within the powers conferred on a tenant for life by the Settled Land Acts 1882 to 1890. No further

[1] This somewhat cumbrous form seems to be the official mode of citing the Acts.

[2] Conveyance of lands to a college in satisfaction of a liability, fair at the time, will not be upset if at a later date they become of greater value. *A.-G.* v. *Pembroke Hall*, [1825], 2 Sim & St., 441.

[3] The Copyhold Act, 1894, provides for enfranchisement where a university or college has leased a manor for life or lives or for years. For the purpose of enfranchisement the lessor and lessee jointly constitute the lord of the manor, (57 & 58 Vict., c. 46, s. 78).

[4] In a lease by a college the head is bound to affix the college seal to the instrument, though he be in a minority (*R.* v. *Windham*, [1786], Cowp. 377).

beneficial leases are to be granted.[1] Powers of sale, enfranchisement, exchange, partition, and building leases with option of purchase are not to be exercised without the consent of the Board of Agriculture and Fisheries.[2] The Board may dispense with the report of a surveyor and may authorise loans for university or college purposes, repayable by instalments, usually in thirty years. The purposes to which capital money may be applied and the improvements for which money may be borrowed are set out in the schedules to the Act of 1898. The practical effect of the Acts is that a university or college may grant, without the consent of the Board, a building lease (without option of purchase) for ninety-nine years, a mining lease for sixty years, and any other lease for twenty-one years, except of the college itself. Capital money is usually payable to the Board, but the Acts do not authorise the vesting of land in the Board.[3] The Board is entitled to costs of appearance on petition by the lord after enfranchisement for investment of the fund.[4] Money arising from the compulsory sale of land under the Lands Clauses Acts, 1845, standing in court cannot be applied for new buildings of a college without the consent of the Board. If the Board consent, whether by order under seal or by appearing by counsel in court, an order for such application will be made under the Act of 1880, although it is not one of the modes authorised by the Lands Clauses Act.[5]

[1] The fines on beneficial leases had been treated as revenue and not as capital. They were a windfall for the existing fellows, but the colleges as corporations derived no advantage from them.

[2] Originally the Copyhold Commissioners; superseded by the Land Commissioners in 1882, and by the Board of Agriculture in 1889. The words "and Fisheries" were added to the title by 3 Edw. VII, c. 31.

[3] It has not been thought necessary to give more than an abstract of the main provisions of the Acts, as the editions of the Acts by Mr. W. B. Skene and Mr. W. B. Gamlen contain the text of the Acts and can easily be consulted.

[4] *Ex parte Queens' College* [1857], 27 L. J., Eq. 178.

[5] *Ex parte King's College*, L. R. [1891], 1 Ch. 333, 677.

Numerous Acts deal with tithe rent-charge,[1] and with the augmentation of benefices and the building, repairing and purchasing houses or buildings for the use of benefices by the loan of money without interest.[2] Grants of land may be made for valuable or nominal consideration or by way of gift, with the consent of the Board, for the purpose of open spaces for the enjoyment of the public, with or without conditions (50 & 51 Vict., c. 32. s. 7). Grants of sites may also be made under the Literary and Scientific Institutions Acts, and under the School Sites Acts; in the case of the latter not to exceed one acre. A lease may be granted instead of a conveyance.[3] A large number of both public and private Acts deal with markets, tolls, widening and paving streets, gas, water, and other matters of local government. Stamp duties on degrees were abolished at Oxford by 18 & 19 Vict., c. 36; at Cambridge by 21 & 22

[1] A grant of lands by the Crown to a college does not exempt the college from payment of tithe, (*Archbishop of Canterbury's Case*, [1596], 1 Rep. 46; *Magdalene College Case*, [1614], 11 Rep. 66). For the validity of a *modus* dating from before 13 Eliz., c. 10, see *Jesus College, Oxford*, v. *Gibbs* [1835], 1 Y. & C. 145.

[2] Especially 29 Car. II, c. 8; 1 & 2 Will. IV, c. 45; and 1 & 2 Vict., cc. 23 and 106.

[3] At one time the law was much more severe than it is at present with regard to the correct description of the lessor, but there was a tendency to support the lease if possible. Queen's leased to Hazel the Maison Dieu at Southampton, the college describing itself as *Præpositus socii et scholares Collegii Reginalis Gardianus Hospitalis*. On an *ejectio firmæ* it was urged that *gardianus* ought to be *gardiani*, "for the college doth consist of many persons and every person is capable." But the court held that a college is one body, and so the singular number was sufficient, (*Queen's College Case*, [1588], 1 Leon. 134). The misnomer of Trinity, Cambridge, as lessors did not avoid the lease (*Trinity College Case*, [1609], 2 Brownl. 243). In another *Queen's* case it was held that confirmation of a demise by *præpositus socii et scholares Aulæ vel Collegii Reginæ* was good although the name given by the founder was *Aula scholarium Reginæ*, (*Ayray* v. *Lovelace*, [1614], 1 Bulstr. 91, also reported as *Dr. Ayraye's Case*, 11 Rep., 18). In a case to the contrary effect, the omission of the words *Beatæ Mariæ* in a lease by the Provost and Fellows of the *Collegium Beatæ Mariæ de Eaton juxta Windsor*, was a misnomer sufficient to avoid the lease (Jenkins, Cent., v, 54). As to devises, it was held that a devise to "Sir John College" was good in equity as an appointment to charitable uses (*A.-G.* v. *Platt*, [1676], Finch, 221). The college intended was St. John's, Cambridge. For a wrong description in a grant by the Crown see *Dean of Christ Church* v. *Parott* in Appendix.

Vict., c. 11; on matriculations by the Acts of 1854 and 1856 respectively. By 2 & 3 Will. IV, c. 80, colleges were authorised to enter into agreements with their lessees for the purpose of settling unknown or disputed boundaries or quantities of property leased.

The Acts affecting the liability of universities and colleges to imperial and local taxation are very numerous.[1] Colleges at Oxford and Cambridge, the colleges of Eton, Winchester, and Westminster, and the stipends of university professors and readers, and of college masters, fellows, scholars and exhibitioners, are exempt from land tax (38 Geo. III, c. 5; made perpetual by 38 Geo. III, c. 60).[2] As to estate duty, by the Finance Act, 1894, (57 & 58 Vict., c. 30, s. 15 (2)), the Treasury may remit it in respect of pictures, prints, books, manuscripts, works of art, or scientific collections of national, scientific or historic interest given or bequeathed to any university.[3] Allowances in respect of the duties payable under Schedule A of the Income Tax Act, 1842, are to be made for repairs of colleges or halls, and for college buildings and offices not occupied by an individual member or any person paying rent for them, and for repairs of the college buildings, offices and gardens (5 & 6 Vict., c. 35, s. 61). By the Finance Act 1907 (7 Edw. III, c. 13, s. 21), every corporation must, after notice from the assessor, deliver a return of the names and salaries of persons employed.[4] Inhabited house duty is charged on

[1] The earliest statutory exemption from taxation appears to have been an ordinance of the Commonwealth of 1645.

[2] University and college property is not exempt from land tax, but much of it has been redeemed. In *All Souls College* v. *Costar*, [1804], 3 B. and P. 635, it was held that a purchase of lands on condition of the college paying all taxes rendered it liable to pay land tax on the lands purchased.

[3] The exemption does not apply to colleges.

[4] Before this Act it was held that the bursar of St. John's, Oxford, not on the foundation, was liable to direct assessment under Schedule E, as the holder of an office of profit, (*Langston* v. *Glasson*, L. R. [1891], 1 Q. B. 567). His tax would now probably be paid through the college, and he would be entitled to claim the lower scale on his stipend as "earned income" under s. 19 of the Act.

every separate chamber or apartment in a college or hall (14 & 15 Vict., c. 36). Any college or hall at Oxford and Cambridge, and all offices and employments in connection therewith, and all persons residing therein, are within the jurisdiction of the general commissioners of the university with respect to assessment of income tax and inhabited house duty, (53 Vict., c. 8). The tax of five per cent. on corporate property imposed by 48 & 49 Vict., c. 51, does not affect property appropriated for the promotion of education.

The liability of Oxford to poor rate is mainly determined by 17 & 18 Vict., c. ccxix; of Cambridge, by 19 & 20 Vict., c. xvii. The public buildings of the university and the college chapels and libraries are exempt by the Cambridge Act.[1] The Oxford Act provided for the right to exemption being decided by the Queen's Bench on a case stated. This was done in 1857, and it was held that the public buildings of the university were exempt, but not the college chapels and libraries.[2] Other rates, such as the general district rate, the education rate, &c., follow the same lines, as they are now collected together. In the case of the Oxford University Boat Club barge it was held that there was no proof of occupation so as to render the club liable to poor rate. The right was merely an easement.[3]

The universities and colleges as property owners might be civilly or even criminally liable, the latter probably only for quasi-criminal offences, such as non-repair or obstruction of a bridge or highway.[4] They are undoubtedly liable for injuries to their servants under the Workmen's Compensation Act, 1906, for the interpretation clause of the Act,

[1] Downing was held liable for a paving rate, although founded after the Cambridge Paving Act of 1788, (*Downing College* v. *Purchas*, [1832], 3 B. & Ad. 162).

[2] *Re Oxford University*, 8 E. & B. 184.

[3] *Grant* v. *Oxford Local Board*, [1868], L. R., 4 Q. B. 9.

[4] *R.* v. *G. N. E. R. Co.*, [1846], 9 Q. B. 315.

(s. 13) includes under employer "any body of persons corporate or unincorporate."

Very little public money is paid to the older universities. Most of it goes to those of more recent foundation. As far as Oxford and Cambridge are concerned, the only cases seem to be certain grants to the Regius Professors, by the Board of Agriculture and Fisheries for agricultural education, and by the India Office in aid of the tuition of selected candidates for the India Civil Service.

By the statutes framed under the authority of the Act of 1877 the accounts of the universities and colleges are audited annually and after audit published in a particular form; a general account of (1) capital, (2) revenue, an account of special and trust funds, and a schedule of loans from the Board of Agriculture and Fisheries, showing the sum borrowed and the instalments remaining due. At Oxford the finance ministers are the Curators of the University Chest, at Cambridge the Financial Board.

Although a corporation cannot be a copyholder, still heriot custom may be due on the death of the head of a corporation,[1] or by one corporation to another.[2]

JAMES WILLIAMS.

III.—THE MORTGAGE OF LETTERS PATENT.

OF the various kinds of mortgage with which the legal practitioner has ordinarily to deal, there is perhaps none as to which greater uncertainty and misapprehension prevails than the mortgage of a patent. Coming as it does

[1] See the case of the Provost of Worcester, Grant, 109.

[2] See the case of Merton and Magdalen, *ib.* Another curious Merton Case could hardly occur now. It is an echo of the Wars of the Roses. Parliament had granted lands of Merton to King's. Merton recovered them by attachment following proceedings for forcible entry, [1464], Y. B., 3 Edw. IV, 1.

partly in the domain of writers upon conveyancing and partly in the domain of writers on Patent law, the subject has, so to speak, fallen betwixt two stools, and has received inadequate notice at the hands of either. Yet it is a matter, the peculiarities of which deserve rather special attention, particularly in view of the fact that mortgages of this kind occur in practice with comparative frequency. The object of this article is to bring together, from various scattered sources, all the available information bearing upon this subject, and to present it in a compact and accessible form suitable for general reference.

The peculiarity characterising the mortgage of a patent arises entirely from the very special nature of the property charged. Letters patent for invention, though sometimes described generically as a "franchise" or as a "chose in action" bear, in fact, no very close resemblance to the commoner forms of either of these classes of property. Strictly speaking, a patent is a species of property altogether *sui generis*, and when regarded from the point of view of affording security for the advance of money, it will be seen to possess several features differentiating it in a marked degree from other kinds of property that are more usually the subject of a mortgage.

In the first place, there is the fact (by no means generally realised) that a patent itself, even though its validity be unimpeachable, is a thing of absolutely no intrinsic value; it is merely documentary evidence of the inventor's title to certain privileges which, in their turn, may be worth much, little, or nothing at all, according to the circumstances. For an invention, no matter how ingenious it may be, has no real marketable value, apart from its capability of being worked at a profit. Needless to say, the mortgage of a patent gives the mortgagee no charge upon the patented plant or machinery, or upon articles made in accordance with the patented process.

Secondly, it must be remembered that a patent is, like a leasehold, in the nature of a wasting security. Its value diminishes gradually year by year, until at the end of the fourteenth year it is wholly extinguished. From the point of view of the patentee, of course, who works his own invention and builds up a business on the basis of it, the value is not wholly extinguished: he may continue to reap the benefit of a virtual monopoly, long after the expiration of his patent, in the shape of the goodwill attaching to the business. But this *posthumous* value of a patent, as it may be called, is of no good to the mortgagee.

Thirdly, a patent is susceptible of joint-ownership of a peculiar nature. All joint-owners have equal rights in the patent. Thus, for example, the proprietor of a hundredth share in a patent has just as much right to work the invention for his own benefit as the proprietor of the remainder, subject only to the restriction that he cannot grant licenses without the concurrence of his co-patentee. There is, however, no obligation upon him to account for profits derived from licenses any more than for profits derived from his own working.

In dealing with the mortgage of a patent, therefore, such considerations as these have to be kept in mind, and in drafting the mortgage deed, special clauses have to be framed to meet them.

With these preliminary observations it will be convenient to proceed at once to a closer examination of the subject.

(1) *The rights of the mortgagor and mortgagee of a patent respectively.*

Notwithstanding that the patentee, by executing a formal mortgage of his patent, transfers "the full and exclusive benefit thereof" to the mortgagee, he still continues (so long as he controls the working of it—so long, in other words, as he remains mortgagor in possession) to be the "patentee"

within the meaning of sect. 93 of the Patents and Designs Act 1907. His name is retained upon the Patent Office Register as proprietor; and it would seem that he is regarded, at least by the Patent Office authorities, as *sole* proprietor. Against this view, however, has to be put the opinion expressed by Mr. Frost, in his work on *Patent Law and Practice* (Vol. II, p. 128, 3rd ed.), that the mortgagee and mortgagor *together* constitute the proprietor.

The relationship of mortgagor and mortgagee, as parties to legal proceedings, admits of more definite statement, being one of the few matters affecting this subject that has been judicially determined. It was decided by the House of Lords, in *Van Gelder Apsimon & Co.* v. *Sowerby Bridge Flour Co.* ([1890], 7 R. P. C. 208), that the mortgagor of a patent is entitled to sue in respect of an infringement in his own name without joining the mortgagee as plaintiff; and further, that the mortgagee does not possess such an interest in the patent as to make it necessary that he should be joined as defendant. The mortgagor can also, it seems, apply to amend his patent specification without making the mortgagee a party; the latter, on the other hand, can only make the application jointly with the mortgagor.

In a petition for revocation of a patent, the practice requires that the patentee and all persons interested shall be made respondents; hence, both mortgagor and mortgagee are necessary parties. In the case of a petition for extension of the term of a patent, the rule is the same (*Church's Patent*, 3 R. P. C. 95).

So long as the mortgagor remains in possession, the mortgagee of a patent is regarded merely as an incumbrancer, and he is entered on the Patent Office Register not as "assignee," though such is his strictly legal title, but merely as "mortgagee." A mortgagor in possession has the right either to work the invention himself or to grant licenses to others to work it. But it should be

observed that, in the absence of express provision in the mortgage deed, licenses granted by the mortgagor alone are liable to repudiation by the mortgagee. By virtue of the rule of estoppel, however, such licenses are binding as between the licensee and the licensor, and also as between the licensee and the licensor's assignee (see *Cuthbertson* v. *Irving*, 4 H. & N. 742).

Unless the mortgage deed contains a proviso giving the mortgagor quiet enjoyment until default, it is open to the mortgagee to enter into possession of the patent at any time. Until he takes this step, however, the mortgagee has no right to interfere in the working of the invention.

As there can obviously be no physical entry upon a patent, the intention of taking possession must be signified by other means, as, for instance, by some decisive act affecting the control of the patent rights. There is no judicial pronouncement on this point, but applying the principle of those cases most closely analogous to that of a patent, it would appear that, in order to assume possession, the mortgagee must take active steps to exclude the mortgagor from further enjoyment of the fruits of his patent.

Just as a mortgagee can, by bringing an action for ejectment, compel a mortgagor to surrender possession of land or tenements, so presumably a mortgagee of a patent could obtain possession by getting an injunction restraining the mortgagor from continuing to work the patented invention. Reasoning upon the same lines, it seems also that just as the mortgagee of Blackacre may enter into possession of merely a part of the mortgaged estate, so the mortgagee of a patent may, if he chooses, assume only partial control of the patent rights, leaving the mortgagor in undisturbed possession of the remainder. In other words, he may assume the rights of co-patentee with the mortgagor. As joint-owner of the patent in such a case,

he would have the right of working the invention independently and for his own profit; but, in view of sect. 37 of the Patents Act 1907, he could only grant licenses with the consent of the mortgagor.

In *Steers* v. *Rogers* ([1892], 10 R. P. C. 245), the House of Lords was called upon to consider the position of a person who was both co-owner in fee of one moiety of a patent and mortgagee of the other moiety. It was held that he was entitled to work the patent himself without liability to account to the mortgagor. Had he been in possession of the patent solely in virtue of his mortgage, he would, of course, like any other mortgagee, have been liable to account for profits, and to answer for wilful default in any action for redemption that might subsequently be brought.

A mortgagee in possession (either wholly or in part) is, it is submitted, entitled to registration as proprietor and patentee, being, in virtue of a legal assignment accompanied by actual participation in the working of the patent, the person "for the time being entitled to the benefit of the patent."

(2) *Form of mortgage of a patent.*

A patentee may mortgage his rights by (*a*) mere deposit of the patent grant with the person advancing the money; (*b*) an informal document indicating the intention of the parties to create a mortgage, but not effectually transferring the legal interest; (*c*) by deed.

Informal or equitable mortgages such as (*a*) and (*b*) require little comment. Briefly stated, the rights of an equitable mortgagee of a patent are as follows:—

(1) He may foreclose; whereupon the mortgagor will be directed to execute a legal assignment of the patent to the mortgagee.

(2) He may obtain an order for sale by applying to the Court under the Conveyancing Act 1881, sect. 25.

(3) He may require the mortgagor to execute a formal mortgage. This right, however, only exists where there is a written agreement to that effect.

Beyond the above, the equitable mortgagee has no further powers and no covenant rights.

It may be added that one of the peculiar privileges of a mortgagor by mere deposit of his patent is, that he is not compelled to give the usual six months' notice of his intention to redeem.

Letters patent being granted under seal, the legal interest in them can only pass under seal; hence, to have full effect, a mortgage of a patent must be by deed. It is not intended here to discuss in detail the terms of such an indenture. Good precedents will be found in the *Encyclopædia of Forms and Precedents*, Vol. VIII, p. 685, and in Morris's *Patents' Conveyancing*, p. 167. But it may be useful to call attention to a few special clauses, the insertion of which is rendered desirable by the peculiar nature of the property charged.

The ordinary provision for quiet enjoyment takes the form, in the mortgage of a patent, of a clause debarring the mortgagee, until the power of sale has arisen, from interfering in the working of the patent by the mortgagee, but giving him (the mortgagee) the sole right to work the invention at any time after the power of sale has arisen.

To obviate the risk of subsequent repudiation by the mortgagee of licenses granted by the mortgagor, the latter should be empowered to grant licenses in the joint names of himself and the mortgagee, express authority being given him to act as the mortgagee's attorney for this purpose; but not so as to involve the mortgagee in any liability thereby. A proviso is usually added stipulating that licenses shall not, except with the mortgagee's consent in

writing, be granted otherwise than for royalties. The reason for this stipulation is, that if the mortgagor sells the right to use the patent for a premium he is in effect anticipating what may fairly be regarded as the income of the patent, to the possible detriment of the mortgagee.

A patent being, as has been pointed out above, in the nature of a wasting security, it is very desirable that some provision should be made in the mortgage deed for the gradual liquidation of the principal debt during the life-time of the patent. Otherwise the mortgagee, content to leave things undisturbed so long as the interest is punctually paid, may overlook the fact that the value of his security is dwindling year by year, until he is rudely awakened by the discovery that the term of the patent has expired, or, at any rate, is so far spent that its residual value is practically *nil.*

The precarious nature of the life of a patent, exposed as it is to the risk of revocation, makes it advisable, moreover, for the mortgagee to have a clause inserted stipulating that if, upon the extinction of the patent, the mortgage debt on any part of it is undischarged, the borrower shall execute a supplementary assurance charging the outstanding debt upon some other property of proportionate value. It need scarcely be added that the mortgage of a patent should invariably contain a clause giving the mortgagee a charge upon all improvements in, or additions to, the original invention.

(3) *Mortgagee's remedies.*

It remains to be considered how the mortgage may be enforced. Assuming that the mortgagor is in default, the statutory period after notice having elapsed, the following courses are available to the mortgagee for the purpose of realising his security :—

(*a*) He may assume control of the patent.

(*b*) He may foreclose.
(*c*) He may exercise his power of sale.
(*d*) He may appoint a receiver.

The first of these courses has already been touched upon. By entering into possession the mortgagee would become entitled to receive the royalties accruing from licenses granted by the mortgagor, and all other profits directly attributable to the working of the patent. But, on the other hand, the onus would be upon him of working the invention to the best advantage; for the rule is that a mortgagee in possession is liable to account for everything actually received, and further, for everything that but for his default or negligent conduct he might have received. It is evident, therefore, that the position of a mortgagee in possession of a patent is by no means free from responsibility; nor is it, as a rule, likely to prove beneficial, inasmuch as the exploitation of a patent in defiance of the inventor, or, at least, without his co-operation, has small chance of success.

Foreclosure is a dilatory proceeding, necessitating six months' notice to the mortgagor, and the only advantage it offers over the other alternative courses is to give the mortgagee the power of working the invention himself without incurring the liability to account.

The power of sale, usually the most valuable of the mortgagee's remedies, is, in the case of a patent, of very doubtful advantage. If the right to sell arises early in the life of the patent, the chances of realisation may be fair. The circumstances, however, under which the mortgagee is driven to exercise his power are in most cases strongly adverse to the chance of selling the patent. It is, as a rule, only after the mortgagor has frittered away the best part of the life of the patent in unsuccessful exploitation that the mortgagee is faced with the necessity of realising his security; and then it is generally too late.

It should be observed, however, that the mortgagee who succeeds in selling his security in virtue of his power of sale has this advantage which, had he proceeded by foreclosure, he would have forfeited, viz., that he can sue the mortgagor for any deficiency between the mortgage debt and the amount realised by the sale of the patent.

The appointment of a receiver under the statutory power is perhaps the mortgagee's most useful expedient. Sect. 24 of the Conveyancing and Law of Property Act 1881 gives a mortgagee this right as soon as the mortgagor has made default entitling the former to exercise his power of sale. The appointment may be made simply by writing under his hand. The receiver so appointed is deemed to be the agent of the mortgagor, and the mortgagor is solely responsible for the receiver's acts and defaults, unless the mortgage deed otherwise provides.

KENNETH R. SWAN.

IV.—THE OFFICE OF JURAT IN THE ROYAL COURTS OF JERSEY AND GUERNSEY.[1]

THE origin of the Royal Courts of Jersey and Guernsey[2] is lost in the mists of antiquity, but at the earliest period of which there is record they were similar in constitution. The *Precepte d'Assise*, dated 1331 and confirmed

[1] The preparation of this article would not have been possible without the generous assistance, as to Jersey of E. T. Nicholle, Esq., Advocate of the Royal Court, and in reference to Guernsey of Quertier Le Pelley, Esq., H.M.'s Greffier, who have kindly revised it.

[2] The best statement of the legal position of the Courts of the Channel Islands, including Alderney and Sark, is contained in an admirable monograph by M. Julien Havet, published in 1878 under the auspices of the Ecole des Chartres. Although the Société Jersiaise has done excellent work in examining and publishing ancient records, M. Havet's researches and conclusions have not been affected in any important particular.

in 1441, which contains the constitution of Guernsey, sets forth that—

"*Les habitans, et demourans en la dicte Isle, eulx et lours prédécéssours onne en usage, et d'ancienne accoustumance de faire et eslire de eulx mesme douze hommes des plus notables et discrets, sages, loyaulx et riches de la ditte Isle.*"[1]

Similarly in Jersey it was claimed before the itinerant justices in 1309:

"The commonalty comes and says that they and their progenitors the Islanders here from a time which memory runneth not always used to have such Jurats of themselves who ought to be elected by the Officers of the Lord the King and the chief men of the country when there shall be need, that is to say, after the death of one of them another trustworthy." [2]

Thus in both islands the Jurats were elected, but in course of time there has developed a difference in the body of electors. In Jersey the Jurats are chosen by the ratepayers, and when there is a contest it is accompanied by the incidents familiar in an English county council election. The mode of election has been in the past a fruitful cause of controversy, and the subject on more than one occasion of inquiries by Royal Commission.[3]

In Guernsey the election of a Jurat rests with the States of Election, constituted as follows:—The Bailiff, who is President as the representative of the sovereign; the Jurats, of whom the full number is twelve; the ten Rectors; the Crown Officers; the douzeniers or parochial representatives; and nine deputies elected by the ratepayers of the whole island. By an old *ordonnance* of the Court electors are liable to a fine for absence.[4] The States of Election

[1] Warburton, *Treatise on the History, Laws and Customs of Guernsey*, 1822, p. 148.

[2] *Pleas de Quo Warranto*, 2 Edw. II, translated in *Jersey Prison Board Case* in the *Privy Council Appendix*, Part II, p. 114b, and also issued among the publications of the Société Jersiaise.

[3] *E.g.*, Report of the Royal Commissioners relating to the mode of electing Jurats in the island of Jersey, presented to the King's Most Excellent Majesty in Council, 5th March, 1812.

[4] *Recueil d'Ordonnances de la Cour Royale de l'Isle de Guernesey*, Vol. I, p. 169, 8 Sept. 1632.

have also to choose the Prévôt or Sheriff. The States of Deliberation, which meets for legislative purposes, is similar in its constitution, but only delegates of the parochial representatives have seats, instead of the whole number. The Lieutenant-Governor may be present in either assembly. The candidates for the office of Jurat, who have been nominated beforehand, are proposed and seconded, and speeches made by the members of the States. Voting is by ballot.

In Guernsey the qualification for the office of Jurat has not been further defined than in the *Precepte d'Assise*, but in Jersey they must possess landed property in the island to the amount of forty quarters of wheat (£30 : 15s. 3d.) per annum. They are forbidden to carry on the trade of a brewer, a butcher, a baker, or a tavern-keeper,[1]—the trades formerly licensed by the Royal Court. It has been decided that a person elected to be Jurat, and who had taken the oath of office, could not be a registrar of births, marriages and deaths. The Court therefore declared the incompatibility of the offices.[2] In neither island is any legal training or even knowledge required. The office is honorary. The *Precepte d'Assise* requires that the Jurats—

> "*Servent et doivent servir nostre dit Sr. le Roy et sa commune yllenques, à leur propres coustages et dépens, sans prendre ni auoir ganges ny pension pecunyelle de nostre dit Sr. le Roy ne sa ditte commune.*"

In both islands, however, the Jurats receive certain small Court fees, and dine at the expense of the Crown at the opening of the sittings. In Guernsey they have assigned to them a seat in the parish church.[3] The Jurat is bound to serve or pay a fine, and can only resign with the expressed consent of the Privy Council upon the recommendation of the States.

[1] Report of the Commissioners to inquire into the civil, municipal, and ecclesiastical laws of the island of Jersey, 1860, p. xxxiii.

[2] *Re Gallichan* (1886). *Table des décisions de la Cour Royale de Jersey*, 1885—1888, p. 102. [3] *Recueil d'Ordonnances*, Vol. II, p. 297. 30 Jan. 1824.

Before the Jurat can occupy his seat in the Royal Court he is required to take an oath. At the present time the form of the oath provides an important distinction between the positions of the Jurats in the two islands. In Guernsey the Jurat is called upon to swear that he will be—

"*Vrai et loyal sujet tant au fait Ecclesiastique qu'au temporel, renonçant aux faits et ordonnances du Pape, et à toute puissance et Jurisdiction foraine.*"

It is impossible, therefore, for a Roman Catholic to hold the office, but in Jersey there is no such religious disability. Within recent years the French Roman Catholics have been obtaining considerable influence in the island. The complaint is made that they do not adapt themselves to the insular customs, to which the inhabitants cling tenaciously, but endeavour to substitute their own national ways and procedure. The presence of the Frenchmen is resented, and anxiety is felt as to a possible exclusion of their influence if they should accomplish their undoubted intention of obtaining representation in the States.

In both islands twelve Jurats, with the Bailiff as president, constitute the Royal Court. The Bailiff is nominated by the Crown, and is always a lawyer. He states the law for their information, but they are not obliged to accept his interpretation :—

"If a Jurat shall not be satisfyed concerning any point belonging to the cause in hand, and shall desire to be better informed therein, to the end he may give right judgment in it, the Judge shall cause him to receive satisfaction."[1]

The Jurats generally deliver their opinions publicly, and from them the Bailiff gathers the decision of the Court. In the case of an equal division he has a casting vote, which he is obliged to give, though he may not agree with either section. In Guernsey the Bailiff may do nothing without the Court, but in Jersey he may act in certain circumstances, and has the appointment of officials of the Court.

[1] *Ordres du Conseil*, Vol. I, p. 379. 19 May, 1671.

It is argued sometimes that the position of a Jurat is that of a juryman rather than a judge. The contention was put before the Royal Commission in 1860, consisting of Sir John Awdry, the Earl of Devon, and Mr. R. C. Jebb; but they did not adopt it in their report, which is a valuable statement of the laws and constitution of the island.

The Royal Courts have jurisdiction in all civil and criminal matters. An appeal lies from them to the Privy Council.[1] In both islands there is a separate Court for ecclesiastical affairs. Appeals lie to the Guernsey Royal Court from the Courts of Alderney and Sark, and it has also the right to allow the resignation of an Alderney Jurat.

In Guernsey the business is transacted by a Court formed of the Bailiff and generally four, but not less than two, Jurats known as the "*Cour du quartier.*" The full Court, called the "*Cour en Corps*" consists of the Bailiff and not fewer than seven Jurats, and is a Court of appeal. In Jersey the normal sitting of the Court is formed by the Bailiff and two Jurats, sitting as the *Cour d'Héritage, Cour de Billet,* or *Cour de Samedi.* A Court cannot be held without the presence of one of the law officers of the Crown to advise or represent the interests of the Crown whenever necessary, but they have no voice in the decision of the Court.

Peculiar to the Jersey Court is the precedence given to the Seigneur de St. Ouen among the Jurats.[2] Another peculiarity is the office of Vicomte, who, besides being coroner, also represents parties who fail to enter an appearance. He is also the chief executive officer. That position is held in Guernsey by the Prévôt. In Guernsey the Royal Court itself performs the duties of a coroner. The clerk of the Court in both islands is the Greffier, who, in Jersey, is nominated by the Bailiff, but in Guernsey is appointed by the Crown. In Jersey the Jurats may act as commissioners

[1] *Statutory Rules and Orders Revised, 1904.* "Judicial Committee," pp. 30, 44.

[2] *Ordres du Conseil,* Vol. I, p. 297. *Lettre Royale,* Oct. 15, 1667.

of oaths, but in Guernsey this right is particularly denied to them.

Trial by jury in criminal cases was established in Jersey in 1786, but does not exist in Guernsey. In this and many other respects the practice of the law differs essentially and widely. "It is, indeed, not easy for two different nations to be more distinct from each other in many of their laws than Jersey and Guernsey."[1] The two islands keep quite apart, and desire to maintain their independence as strongly as they uphold their right of self-government in opposition to claims put forward by the Crown. In asserting the power of the Royal Court in Guernsey, it is contended that the Lieutenant-Governor is subject to it by his oath, in which he promises—

> "If peradventure you should act or do anything contrary to the said privileges, ancient customs and ordinances, that you will at all times upon conference with the Bailiff and Jurats and their pointing it out to you, redress the same in everything that shall be meet and reasonable."

In addition to his judicial work as a member of the Royal Court, the Jurat also has a seat in the States as a legislative assembly. There is evidence for the belief that the States were originally an outcome of the Royal Court. Thus he assists in making as well as interpreting the laws. Furthermore, the Guernsey Royal Court has retained its own legislative authority, apart from the States, of which the Jersey Court was deprived in 1771.

Even those who have the most intimate knowledge of the customs of the island have difficulty in defining the boundary between the subjects legislated upon by the Royal Court and the States. It is suggested that the former never actually legislates, but makes administrative orders, whose effect cannot easily be distinguished from the result of statutory enactment. This legislative power of the Royal Court has one advantage, that it enables urgent matters to

[1] *The Channel Islands*, by Dr. Ansted and R. G. Latham, revised by E. T. Nicolle, p. 432.

receive immediate attention. The Court requests the Law Officers to prepare a bill, takes it into consideration at the next sitting, approves the measure, and thereupon it becomes the law of the island. On the other hand, this power is a source of conflict with the States, as, if the *ordonnance* is intended to be lasting, it must be laid before the States for their approval. But without that sanction or the assent of the Lieutenant-Governor it may have the full force of law.

This dual capacity renders the position of the Jurat unsatisfactory, and the constitution of the Courts has been declared to be "anomalous and incompatible with its competency to decide questions of law."[1] The scarcity of lawsuits and the fact that disputes are often compromised may be ascribed chiefly to this cause. Nevertheless there seems to be no immediate prospect of effecting the obvious reform of employing a paid judiciary of trained lawyers. The recommendation was one among many made by the Royal Commission in 1860. One reason for satisfaction with the existing state of affairs probably lies in the nature of the laws which have to be administered by the Jurats.

In Jersey certain of the laws were codified in 1771; but the work is an unsatisfactory compilation, of which the greater part has fallen into desuetude.[2] There is a collection of Orders made by the Sovereign in Council affecting the island, and the "*lois et réglements*" of the States have been collected in an edition recently completed.[3] Guernsey has no code, but there are collected editions of the *ordonances* of the Royal Court, and also of the Orders in Council applying to the island. The laws governing the island of Guernsey are mostly taken from *Le Coutumier de Normandie, Commentaires de Terrien sur le*

[1] *Jersey Laws Commission, ubi sup.*, p. xxxiv.

[2] A second edition was issued in 1860.

[3] As there is some difficulty in obtaining these laws in England, it may be mentioned that the States printer is Mr. J. T. Bigwood, 13, Broad Street, Jersey, and in Guernsey application should be made to H.M.'s Greffier.

Droit Civil, Commentaires de Basnage, Pothier and other Norman commentators. There adoption has been sanctioned by an Order intituled "Approbation des Lois." Since 1885 the decisions of the Jersey Royal Court have been published in digests from time to time; but in Guernsey the rulings of the Court are only available in MS., but readily accessible in the excellent muniment rooms of the Court, which are open freely to the public. The influence of English commercial law and procedure is felt in Jersey, but the procedure of the Court and the land laws are based on the Norman coutumier, and the whole atmosphere of the proceedings is of a Court unaffected by modern changes in practice.

Sometimes the Jurat has served the office of constable, in which he has a certain amount of municipal and administrative work, so that he has had an apprenticeship for the higher office, so far as his legislative and administrative duties in the States are concerned. A change, however, in the calibre of the Jurat would involve a complete overhaul of the administration of justice. It can readily be understood, therefore, that the islanders hesitate to upset arrangements which have served them well and developed according to their needs during hundreds of years.

C. E. A. BEDWELL.

V.—RESPONSIBILITY IN LAW.[1]

(Continued from Vol. XXXII, page 457.)

IX.

IT will not seriously be questioned at the present day that man has a spiritual as well as a material origin—that he is constituted of a higher and a lower self.[2] The higher self will correspond with his spiritual origin, the lower self with his animal origin: and the character of the man will depend on the nature of the control: when the spiritual and the material faculties work together in unison, the man is sane; when these respective faculties work no longer together in unison, when there is a divided personality in which the normal action of the spiritual upon the material is arrested or perverted, the man is no longer sane. The material part of man is endowed with life—has a soul in like manner as the lower animal creation; and, so far as we have any right to anticipate, this soul in conscious existence is intimately related to the life of the body—coming in with the first breath of life and going out with the last: the spiritual part of man is self-existent—an emanation from the Divine of a new self at conception; and, as we have every reason to believe, this spirit in sub-conscious existence is fitted to control soul and body during life and is freed at the moment of dissolution and survives.[3]

[1] Sections I to VI of this article appeared in Vol. XXXI (1906); Sections VII and VIII in Vol. XXXII (1907). Section IX (conclusion) should have appeared in Vol. XXXIII (1908) but was unavoidably held over. The treatise with some alterations and additions has now been published in book form by Messrs. Butterworth & Co., Bell Yard, Temple Bar.—Ed. *Law Magazine & Review.*

[2] Lodge, *The Substance of Faith*, 77; Myers, *Human Personality*, Vol. I, 14, 15; Josiah Royce, *The Spirit of Modern Philosophy*, 340, 372–80.

[3] *St. Matthew*, xxvi, 38; *St. Luke*, xxiii, 46; *Psalms*, cxvi, 8; lvi, 13; xxxi, 5; *Acts of the Apostles*, vii, 59; Hudson, *The Law of Mental Medicine*, 23, 25–8; 83—92.

In these spiritual and material faculties we are able to trace the several origins of the intuitional and the empirical, the rational and the experiential, qualities of man; we can discover the correspondence of the intuitional in man to the instinctive in the lower animals; and we can see how man, when bereft of his higher faculties, may be so "totally deprived of his understanding (as not to) know what he is doing no more than . . . . . . a brute or a wild beast."[1] The spirit is the true self; the soul and body are the manifestation (incarnation) of the spirit; but the spirit may be deposed from its seat, and soul and body be possessed by alien influences—thus arises the phenomenon of a divided personality which may occur spontaneously under certain psychopathic conditions, or be artificially produced in cases of hypnotisation.[2]

The normal mind being thus constituted of supraliminal and subliminal faculties functioning upon a primary basis of intellect, feelings and will, the impairment or dispossession of either of these two faculties must inevitably react upon the three basal functions; and we would expect accordingly that states of abnormality should show themselves indifferently—in the intellect by way of defect of reason, in the feelings through perversion of moral sense, and in the will from misdirected action. These various deflections from the normal will manifest themselves under various phases and in varying degrees; but, in all cases, we shall have to look for some sign of that impairment of the material or dispossession of the spiritual, which may arrest the harmonious action of the higher and lower faculties of the mind, before we shall arrive at a true criterion of responsibility. We may classify insane states for convenience sake under three main headings, and in each

[1] *Arnold's Case*, Mr. Justice Tracey, in his charge to the jury, took this view of such a madness "as is to be exempted from punishment," 16 State Trials (Howell), 765, 695—766.

[2] Myers, *Human Personality*, Vol. I, 203-5, 173, 62, 217, 65; Vol. II, 192-8.

case we shall find that one or other of these criteria is a distinguishing feature.[1] First, we find a certain order of cases, distinguished by arrested mental development, generally shown as idiocy or imbecility.[2] Secondly, we find a certain order of cases, easily distinguishable by physical disease or decay: these may conveniently be described under the general heading of dementia.[3] Thirdly, we find a general order of cases, distinguishable by indications of (a) deflected intellection, (b) perverted feeling, (c) misdirected will, to which the general term mania may be most aptly applied.[4] The cases falling under the first and second orders do not often present much difficulty on account of the marked pathological symptoms which attend these mental states. It is the third order of cases to which we have here to devote special attention on account of the difficulty that has been experienced, by the medical and legal professions alike, in finding a common test by which they may be marked off from cases of ordinary depravity.

The difficulty has arisen from not perceiving that insanity, as an abnormal mental condition, is owing to the inharmonious action of the higher and lower faculties, and that it may have its origin not only in the impairment of the lower but in the dispossession or perversion of the higher. There is a moral and spiritual side to insanity as well as a physical and mental: it may originate by way of certain predisposing physical conditions; it may develop by a gradual weakening of moral control. The tragedies of life come through the cherishing of inordinate affections. The history of many cases of insanity is to be read in the growth of insistent ideas:[5] here we come upon signs of a divided personality—the evil in the heart of man warring against the good; the evidence goes to prove that the character of the

[1] Taylor, *Medical Jurisprudence*, Vol. II, 484, 4th ed.
[2] *Ibid.*, 502–4. [3] *Ibid.*, 501–2. [4] *Ibid.*, 484–93.
[5] "Insanity of Doubt," by P. C. Knapp, M.D. (*The American Journal of Psychology*, Vol. III, p. 1)

man has changed and the warring elements have become conspicuous. In such cases, the evidence will show not the progress of a physical disease so much as the growth of morbid ideas acting upon a system weakened by nervous shock or suffering under hereditary taint. In this way the control of the true self may suffer eclipse.

The process of disintegration may have made considerable advance without having attracted much notice; but it may generally be traced back to some congenital weakness or inherited tendency, or it may be to some actual cerebral lesion.[1] In this view, the unifying power of the spirit over the organism has given way to instability and doubt, and "the persistence of an uncontrolled and unmodifiable group of thoughts or emotions . . . . become alien and obtrusive, so that some special idea or image presses into consciousness with undue and painful frequency":[2] and thus arises the *fixed idea* and other phases of possession. When the disintegrating process has arrived at this stage, the personality is split up and the subject may come under the control of alien powers. It has already been shown how immeasurable is the spiritual power that resides in Faith. It includes the sum of knowledge and belief; "but it must also include all the spiritual energies of the human soul. To say the least, it must be the mental condition precedent to enable the soul to exercise any of its powers."[3] When Faith is lost, what is there to put in its place? When the soul is unmoved by faith, the organism becomes the creature of suggestion:[4] when the spirit, the true self, has ceased to exercise its powers, suggestion from within or from without—self or alien—usurps its place. We may follow out the process artificially under the phenomena of hypnotism.

[1] Myers, *Human Personality*, Vol. I, 39, 40.

[2] *Ibid.*, 40. P. C. Knapp, M.D., "Insanity of Doubt" (*The American Journal of Psychology*, Vol. III, January, 1890, Art. 1).

[3] T. G. Hudson, D.Ph., *The Law of Mental Medicine*, 18, 19.

[4] *Ibid.*, 23, 25, 26 7.

X.

Let us consider for a moment what takes place under hypnotism—what is the condition of the hypnotised subject and how far hypnotic states may resemble certain phases of insanity.

We have already seen how power resides in the spirit of man through faith—trust in the unseen:[1] "even now the organism of each man is passing and must pass increasingly under the control of his spirit . . . . his spirit indraws from the metetherial environment an energy limited only by the intensity of its own appeal: in things physical as well as in things spiritual, 'by grace we are saved through faith.'"[2] When faith has given place to instability and doubt, the mind lies open (as has been seen) to insistent ideas—come from what source they may: the spirit having lost control, the organism lies a prey to alien influences—ready from the material or metetherial environment to enter into possession.

It will be instructive now to follow out one or two instances of hypnotic trance and to notice how similar are the manifestations artificially induced in the hypnotised subject to those which we are familiar with in alleged cases of insanity—that perchance we may in hypnotic phenomena find an explanation of cases of possession and of the various forms of mania.[3] We may observe in these hypnotic phenomena the control of an alien power, the subdivision of the self, the action of the organism even against the will of the complete self, self-hypnotisation—allowing oneself to become possessed, self-induced delusions.[4] "The difference" between hypnotic phenomena and ordinary subliminal functioning "is that what we have seen done spontaneously we now see done in response to our appeal."[5] A marked

[1] *Hebrews*, xi, 1.
[2] Myers, *Human Personality*, Vol. I, 155, 193; 119, 123, 215; *Ephesians*, ii, 8.
[3] *Ibid.*, 168—169.
[4] *Ibid.*, 444—50 (S. 518a—522b).
[5] *Ibid.*, 170.

feature of the hypnotic state, in common with certain insane states, is liability to delusion—producible from self, or alien, suggestion.[1] In either case the subject, having no faith to rest upon, is in a condition of almost complete receptivity to suggestion—of the operator in the one case, and of the possessing influence or insistent course of ideas in the other. Here we have alternating states of consciousness, and the essential characteristic of one at least of the states of a divided personality is the invasion of an alien power.

This assumption will not meet with a ready assent; but the cases in mental pathology are very numerous to which no other hypothesis will afford a more satisfactory explanation. By way of illustration, one may cite a couple of cases from the public prints. In the first of the two cases the full particulars, as published in the daily journal, are given.[2] "Lying on the grass in a walled-in garden of which the door was locked, a girl of sixteen . . . . was found unconscious and in night attire early on Sunday morning near Wellington, Shropshire. A blanket, a pair of slippers, eye-glasses and a skirt were found beside her, while she clasped a shilling in her hand. She was taken to a house and revived, being then driven to her home three miles away. She remembers absolutely nothing of how she came to be where she was found. She seemed to be in good health on the Saturday night, but was gone from her room when the maid went to call her in the morning. It appears that she walked no fewer than three miles while fast asleep. How she got out of the house is a mystery, as the door was found locked in the morning. She was very short-sighted, yet must in her sleep have climbed a wall which she would have found difficult to scale in the daytime and in possession of every faculty. Her mind is a complete blank from the time she went to bed until she awoke to find herself in the house

[1] Myers, *Human Personality*, Vol. I, 189; 447, 449.
[2] *Daily Mail*, 31st March, 1908, "Sleeper Walks 3 miles."

three miles away. 'In this girl's case,' a medical correspondent writes, 'the walking movements she went through are so common-place that it would take a very slight brain impulse to start them. A vivid dream might have been a sufficient stimulus. The climbing of the wall is a much more intricate act, demanding an accurate sense of touch and appreciation of distance; and this sort of act, like the recent case in which a sleep-walker shot his wife, is a mystery which brain specialists cannot elucidate.'" This case is instructive: the medical correspondent quoted admits that it cannot be explained on physiological or apparently on psychological grounds—that, in fact, it and other cases of a like order are an unsolved mystery to brain specialists. The reason is not far to seek: the mystery lies deeper than what an inquiry into the functioning of the brain is ever likely to reach. What have we here? The motor-centres of the brain truly are active, but sensibility and consciousness are asleep; yet we have more to account for in this case (as the brain specialist admits) than mere brain action under the impulse of a dream. We may, however, have light thrown on the subject by comparing cases of spontaneous somnabulism with those artificially induced in hypnotism:[1] and we may find that "the spontaneous sleep-waking state itself is manifestly akin to hypnosis,[2] we shall find in fact "that the perceptive power within us precedes and is independent of the specialised sense-organs."[3] This should explain half the difficulty: it affords an adequate explanation of how the young lady was enabled to overcome all obstacles in her path, but it does not explain how her own personality came to direct her movements so as to play a trick upon her during cerebral unconsciousness. To take a step further—the organism may be subject to alternating states of consciousness: "somnambulism often *starts* as an exaggerated

[1] Myers, *Human Personality*, Vol. I, 203, 59. [2] *Ibid.*, 203, 66.
[3] *Ibid.*, 191; Hudson, *The Law of Mental Medicine*, 23, 29, 92.

dream; it *develops* into a kind of secondary personality."[1] We have already seen how naturally, under certain morbid conditions, alternating phases of the personality may be developed. When the organism is out of gear in respect of the harmonious working of the physical and spiritual qualities of man, by reason mayhap of some mental or bodily derangement, the controlling power of the spirit is at stake. The natural result of such a state of things is a feeling of doubt or helplessness: doubt is that condition in which the human mind is peculiarly open to suggestion; even in sane states, the rapid transition from extreme nervousness to desperate determination is of frequent occurrence; and, in insane states, we have no reason to be surprised at a derangement arising in trouble, weakness or doubt, hardening into fixed and insistent ideas, as Dr. Knapp (already quoted) observes,[2] in discussing certain opinions that had been advanced, "Here again I believe that too sharp a distinction has been made, as the *folie du doute* and *paranoia* evidently blend"; and, after some further observations, he cites a case showing "clearly the mixture of insistent ideas and delusions, the combination between insanity of doubt and *paranoia*." To return now to the case of the young lady somnambulist, we have to account not only for the directing power of her unconscious movements, but for the fact that these movements were carried out in opposition to one of the primitive and intuitively-effective laws of our nature—that of self-conservation.[3] If the spirit, the true self, were controlling these movements, one would expect them to have been carried out in conformity with this law: that the movements have not been so carried out raises the presumption that the control, if not absolutely hostile, was at least not

[1] Myers, *Human Personality*, Vol. I, 203, 40—68.

[2] "Insanity of Doubt" (*American Journal of Psychology*, Vol. III, 15—18).

[3] Bain, *Mental and Moral Science*, 79, 80.

intelligently and favourably disposed to the welfare of the organism. A reference to cases of induced somnambulism, in which the subject has put himself under the control of a hypnotist, will show how this may occur: we shall see in fact that "the spontaneous sleep-waking state itself is manifestly akin to hypnosis."[1] The strength of the spirit is in the *Faith* with which it inspires the waking intelligence: when there is a rupture of the personality, as in sleep-waking states, spontaneous or induced, the organism lies open to suggestion which may crystallise into fixed or insistent idea; so that the organism enthralled to the ideas suggested is impelled to action apart from knowledge and alien to conscious desires. In the integrate personality then the spirit, acting in conjunction with the soul, controls the organism through faith; but, when faith is weak, or when soul and body are unable to contend against distracting influences, "there may be a real break" in the personality. In the growth of insistent ideas, "we have to do with an instability of the conscious threshold;" and, as "such changes are generally noxious," they may be regarded "as steps on the road—on one of the many roads—to mental overthrow." We are now in a better position to complete our inquiry into the case of the young lady somnambulist. The whole of the circumstances are amply explainable on the hypothesis of insistent ideas acting on a lower stratus than that of the supraliminal or conscious self.

The second case will carry us a step farther and will help us to complete our review of the situation. We have learnt from our inquiry so far, by comparing induced with spontaneous somnambulisms, that these present similar appearances, and are "sometimes actually interchangeable": we have learnt, further, that what may begin "as an exaggerated dream," or insistent idea, "may develop into a kind

[1] Myers, *Human Personality*, Vol. I, 202–3, 217.

of secondary personality," and that the subject is then in a state out of control of his ordinary conscious self, and comes easily under the influence of any dream-like self-suggestion, or into *rapport* with some alien intelligence. "It has now been actually proved . . . . that the hypnotic trance can be induced from a distance so great and with precautions so complete that telepathy, or some similar supernormal influence, is the only efficient cause which can be conceived."[1] It matters not whether it be by way of an insistent idea, self-suggested, by way of "effluence," from a hypnotiser, or by way of invasion from an extraneous source, the personality which has become thus disaggregated is possessed:[2] "hypnotic trance has created for us . . . . situations externally indistinguishable from what" may be regarded "as true possession."[3]

The second case, in illustration of disintegrated personality, is taken from an article by Mr. Harold Begbie "about insanity," published in the same Journal[4] as the former case. Mr. Begbie, after lucidly remarking—"It is not a diseased brain or a small brain that is responsible in every case for the teasing mystery of insanity: some shadowy cause, as invisible and as intangible as the electron of the chemist, is responsible for this tangle in the affairs of men; and only the law is bold enough to pin a label to the phenomenon" —relates a story told to him by one who had been "a charge attendant in one of the largest lunatic asylums in this country" for many years, and who had been so deeply affected by the spiritual mystery surrounding an incident which had happened to him on a certain day that the impression had never deserted him. The attendant had been going his rounds at midnight: all was silent but the sound of his feet on the stone corridors and the muffled sighs and moans of the unfortunate paupers. "The attendant

[1] Myers, *Human Personality*, Vol. I, 207.
[2] *Ibid.*, Vol. II, 192, 193, 198; Vol. I, 65. [3] *Ibid.*, Vol. II, 193.
[4] "What Science does not know," *Daily Mail*, 10th May, 1904.

thought no more of those sounds than one thinks of the wind in the chimney or the groan of old furniture. But, as he approached one of the enormous wards, his thoughts did for a moment run on before him to a poor creature lying in that room, to whom he knew kind death was now beating its way through time. Would he find the madman dead, or would he find him babbling in feverish dreams of things and sights and thoughts of which our sanity has no cognisance? He entered the long ward . . . . He began his solitary tour of inspection. Down the centre of the sleeping ward he went slowly and perfunctorily . . . . looking at every huddled bed upon his right side before turning at the end to study those upon his left . . . . As he went forward, he heard a noise upon his left a little behind him, and turning round he beheld the poor dying lunatic rising out of bed. The sad and friendless madman . . . . brought his feet slowly to the floor and then stood up with white and strangely quiet face. The attendant thinking he was in delirium moved back to help him into bed. But, before he had taken a few paces, the dying lunatic, as though aware only of his own presence in the ward, kneeled solemnly down at the side of the bed, buried his face in his hands and began to pray aloud." "The attendant tells me," continues Mr. Begbie, "that never before and never since did his ears listen to prayers so fervent, so wonderful, so sublime . . . . He asked for forgiveness and he made supplication for help. From the side of his pauper bed, in the midst of those sleep-breathing madmen, the hushed and fervent voice of this hitherto dumb soul climbed sacredly to the Almighty, asking the Eternal to forgive him the sins of which he had been guilty, and to bow down His Heaven and come and save him. There was no frenzy, no chaotic jumble of words, no aimless sentimentalism. As spirit to spirit, this once hopeless and dangerous lunatic prayed in that haunting scene for God's clemency and Heaven's help,

as though the illusions of madness had rolled suddenly away, and he was looking straight into the Holy of Holies and was unafraid . . . . And, when the prayer was finished, the man rose up from his knees, climbed into his bed, laid his head upon his pillow, and through the little wicket-gate of sleep presently entered the fields of eternity." Mr. Begbie adds that, since the publication of an article dealing with the problems of lunacy,[1] there have been many other stories sent to him in which "there has been this same sudden sanity at the approach of death . . . . The problem in each case is the same—the sudden lull, the sudden ray of light, and then death."

Upon the facts in this and similar cases, for the existence of such cases can scarcely be disputed, several observations may be made. We observe a sudden return to sanity from an insane state—a divided or (it may be) an alternating personality: in the one case, the spirit has lost control, the reason has temporarily vanished; in the other case, the spirit has regained control and reason is restored. There has been dispossession and there is repossession: whether the dispossession has been effected by an alien power, or by an inferior and lower stratum of the self, the result is the same—it requires re-unification of the entire personality to bring back light and reason.[2]

XI.

We are now in a better position to distinguish evidences of insanity from those of mere depravity. Frequently, of course, the one will shade into the other; but, it is always liable to be forgotten that the question that has to be decided in the Courts is not that of insanity but of responsibility. One has, first of all, in such an inquiry to look for evidences of that *change* in the thoughts and habits

[1] Which the present writer has not seen.

[2] Myers, *Human Personality*, vol. I, 42. 217; vol. II, 190–2.

which is the general precursor of disaggregation; and, secondly, to seek out signs of a divided personality.[1] The important thing to consider at this stage is not the extent of this derangement, but whether evidences of a cleavage in the personality does or does not exist.[2]

We now proceed to apply these principles to a few of the cases that have come before the Courts in which insanity has been pleaded as a defence. One result, we trust, may be to sweep out of the way the last vestiges of a controversy over what has been called "Moral Insanity."[3] Moral insanity may be said to exist, more or less, in every criminal act of a depraved type: and it affords no real distinction. What one has to ask, in such cases, is: "Is the man all there"—is there a cleavage of the personality: is the insistent idea deep down as in the subconscious somnambulist—is the possession complete as in the hypnotised subject?[4]

It is not necessary to select our cases: almost any reported case, where the evidence has been produced with care and discernment, will serve to illustrate on one side or the other the principles laid down.

The first case that we shall examine is that of *Reg.* v. *Townley* (1863).[5] The prisoner was tried for the very atrocious murder of Elizabeth Goodwin to whom he had been engaged and who had broken off the engagement. The Prosecution contended that the prisoner knew the nature and quality of the act and that it was prohibited. The Defence pleaded insanity. Verdict, guilty. Martin, B., in charging the jury, said: "The jury must judge of the act by the prisoner's statements and by what he did at the time. Unless they were satisfied—and it was for the prisoner to make it out—that he did not know the con-

[1] Myers, *Human Personality*, vol. I, 40, 57; 42, 59; 60–5.
[2] Mercier, *Criminal Responsibility*, 138, 140.
[3] Taylor, *Medical Jurisprudence*, vol. II, 477, 564–5.
[4] Myers, *Human Personality*, vol. I, 60, 196, 198, 209. [5] 3 F. & F. 839–49.

sequences of his act, or that it was against the law of God and man and would subject him to punishment, he was guilty of murder . . . . The question for the jury was—was the prisoner insane, and did he do the act under a delusion believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder." Under such a charge, it would be difficult to find a verdict of acquittal on the ground of insanity for any maniac who had committed murder. The main characteristic of such crimes is, that the maniac does know what he is doing but finds a delusive excuse for it, as did the prisoner. The evidence went to show a simply phenomenal state of depravity, and this with the judge's charge no doubt weighed with the jury; but there is little doubt, from the evidence, that the murder was committed under a paroxysm of maniac frenzy. There was evidence of delusion; but, as this was of a common type, it was not paid much heed to. There was evidence of that "change" in the life and habits of the prisoner, which has been shown to be the usual precursor of disaggregation of faculty. Finally, the prisoner was reprieved: and he committed suicide in prison—raising the presumption that then at all events he was insane.

The next case that we shall quote is that of *Reg.* v. *Burton* (1863).[1] The chief interest of this case lies in the plea of "moral insanity" having been set up by the defence and having failed. Counsel for the defence said he desired to show a moral disease distinct from depravity. This was clearly the wrong course to take. Wightman, J., in charging the jury, cited the rule laid down by the judges in the *MacNaghten Case*, and directed that "to apply this rule to the present case would be the duty of the jury . . . .

[1] F. & F. 772-81.

Homicidal Mania . . . . as described by the witnesses for the defence showed no delusion. It merely showed a morbid desire for blood . . . . The question for the jury was, whether the prisoner . . . . was incapable of knowing that what he did was wrong." The prisoner, a youth of 18, had been indicted for the murder of a boy. At first he pleaded guilty, but afterwards retracted his plea and pleaded not guilty. The murder seems to have been committed almost aimlessly. On giving himself up, the prisoner said, "I have made up my mind to tell the truth . . . . I knew the boy . . . . but I had no particular ill-feeling against the boy, only I had made up my mind to murder somebody." There was a good deal of evidence to show a mental condition not far removed from imbecility. The prisoner's mother had been sent on two occasions to a lunatic asylum, and the prisoner's brother was of weak intellect. The surgeon who had attended the family, declared that "all these aberations had their origin in functional organic derangement of the brain, which could not always be detected even in dissection after death, and which was necessarily matter of speculative opinion . . . . and," said the witness, "I believe he is labouring under what, in the profession, would be considered as 'moral insanity' —that is, he knows perfectly well what he is doing, but has no control over himself." The judge commenting on this line of defence, described it as "a most dangerous doctrine," and said, "the rule as laid down by the judges is quite inconsistent with such a view." The defence—endeavouring to found a case of homicidal mania upon the plea of moral insanity—failed to satisfy the jury, and the prisoner was convicted. The case is instructive: it shows how the defence may err, in an undoubted case of mania, by grounding upon some general theory of moral or impulsive insanity, when the proper course were to bring into relief specific facts of fixity of idea or delusion.

The next case that we shall review is that of *Reg.* v. *Law* (1862).[1] The prisoner, "a person of somewhat weak intellect," was indicted for the murder of her husband and of her infant child: she had been married for seven years and had had four children, of whom the child she had killed was the youngest—only a few months old. She had been ill after her confinement, and for want of food and necessaries had become to the last degree prostrated by physical weakness. Her husband had been prosecuted and sent to prison for a month for some trifling offence, during which time she had gone into the workhouse: while there she was attended by a doctor for a disorder which caused great loss of blood, leading to exhaustion of the brain, mental weakness, and the utmost nervous depression. "She at times talked wildly of having seen devils, a bright light, etc., and the doctor . . . . and the chaplain . . . . judged these to be signs of insanity . . . . ." Such is the description given of this poor woman's state just before the commission of the acts with which she was charged. She returned home on the day of the expiry of her husband's sentence, having spent the day with her husband's parents; while there, they had been reading the *Bible* together, and she said, on making remarks on Christ's temptation, that she had been tempted by the devil sometimes to cut her husband's throat or her own, and should do so very likely some day. This case is instructive, as showing in clear outline the whole range of disintegrating forces; we have, first, the predisposing cause—a weak intellect; then we have the physical and mental depression—the "change" in the condition of the subject; next we have the loss of confidence in herself, the insistent idea, and the state of being possessed; lastly, just before the commission of the fatal act, we have an apparently sane and reflective state, in which the control of an insistent idea is consistently

[1] F. & F. 836-40.

admitted. The prisoner returned home that evening with her husband, and early next morning she roused her mother, to tell her that she had killed her husband with a chopper as he lay asleep and had afterwards killed the child. Upon this evidence counsel for the prisoner was not called upon, and Erle, C.J., at once charged the jury. The learned judge put the usual question, whether in the opinion of the jury "the prisoner was in a state to know that she was doing what was wrong?" There was "morbid action of the brain"; there was "a state of disease . . . . and other causes which might lead to insanity"; and there were "delusions of the senses which the medical men consider and might well consider symptoms of insanity." The learned judge then went on to say, "She seems to have fancied she saw and heard devils, even when no one was in the house alive but herself; if so, that was a delusion of such a nature as to indicate insanity . . . . It is for you to say whether upon such evidence you consider she was in such a state as to know the nature of her actions and to be aware that she was committing a crime." The jury at once found a verdict of *not guilty*, on the ground of insanity.

No one probably will be found to quarrel over the correctness of this verdict. The evidences of insanity enumerated by the judge seem to have been sufficiently marked to carry conviction to the minds of the jury; but, even taken altogether, it is a little difficult to see how a lack of knowledge of right and wrong can be inferred from them, and yet that was the issue put to the jury by the judge. In the majority of cases that come before the Criminal Courts in which insanity is pleaded as a defence, the "knowledge of right and wrong" test is in fact illusory: this knowledge is scarcely ever wholly wanting until the depths are reached, as in the case of Mr. Justice Tracey's madman.[1] In many

[1] *Arnold's Case*, 16 Howell's *State Trials*, 695; *Hadfield's Case*, 27 *State Trials*, 1288, 1312; the Attorney-General quoting Coke and Hale.

cases, the charge put in such terms is likely to present itself in the complexion of a judicial conundrum to which the judge alone is in a position to supply the answer. In the present case, there is the strongest presumption of the knowledge of right and wrong, and of the nature of the crime that she was about to commit in the narrative of that afternoon's proceedings. When we look, however, to the signs of degeneration as manifested in the hospital, of the growth of a fixed idea, of the evil warring against the good, we need have little doubt that the poor woman was possessed and was not responsible for her actions.

There is a case which may opportunely come in here, as being one in which the knowledge test was appropriately applied. It is the case of *Reg.* v. *Davis* (1881),[1] tried before Mr. Justice Stephen. William Davis, 38, labourer, was charged with feloniously wounding his sister-in-law, Jane Davis, with intent to murder her. The prisoner (who had been drinking heavily but was then sober) made an attack upon Mrs. Davis, threw her down, and attempted to cut her throat with a knife. Ordinarily, he was a very quiet, peaceable, well-behaved man, and on friendly terms with her. At the police station he said, "The man in the moon told me to do it: I will have to commit murder, as I must be hanged." He was examined by two medical men, who found him suffering from *delirium tremens* resulting from over-indulgence in drink. According to their evidence, he would know what he was doing, but his actions would not be under his control. In their judgment, neither fear of punishment nor legal nor moral considerations would have deterred him—nothing short of actual physical restraint would have prevented him acting as he did: he was disordered in his senses, and would not be able to distinguish between moral right and wrong at the time he committed the act: under proper care and treatment he recovered in

[1] 14 Cox, *Crim. Cases*, 563–4.

a week and was then perfectly sensible. For the defence it was submitted, that he was of unsound mind at the time of the commission of the act and was not responsible for his actions.

The broad issue here was, whether or not the prisoner at the time of the commission of the crime had been suffering from delirium tremens, and whether this disease, while it lasted, was of such a nature as to relieve him of responsibility. That was the simple issue put to the jury by the learned judge, and the jury returned a verdict of not guilty, on the ground of insanity.

Stephen, J., in addressing the jury in this case, was careful to distinguish between drunkenness and the temporary disorder which might arise from drunkenness: "If you think (he said) there was a distinct disease, caused by drinking but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity." The learned judge pointed out that "a person may be both insane and responsible for his actions; and the great test laid down in *MacNaghten's Case*[1] was whether he did or did not know at the time that the act he was committing was wrong." It was not necessary to go further in this case; so the question of "knowing what he was doing but his actions not being under his control," raised by the medical witnesses, was properly passed over.

The most important lesson that one may learn from the case is this: that the "knowledge of right and wrong" test can be applied with advantage only in cases where brain disease is clearly capable of proof, and where that disease has made such ravages as to render the sufferer unable "to judge calmly and reasonably of the moral or legal character of a proposed action."[2] We have an instance of such cases

[1] Stephen, *General View of the Criminal Law of England.* 2nd ed., 79.
[2] *Ibid.*

in the one before us, where Mr. Justice Stephen was able to direct the minds of the jury clearly and simply to the points at issue. This is why cases of dementia or of imbecility are comparatively simple, because the question of knowledge may generally be gauged by the extent of the disease or of the degeneration. It is not so in cases of mania: frequently there is no evidence of brain disease discernible; the attack may come on suddenly without any apparent cause—which nothing but an intimate and intelligent knowledge of the previous history of the patient could have discovered; and, in alternating states of sanity and insanity, the serious nature of the malady is often not recognised until the catastrophe has taken place—as in *Hadfield's Case.*[1]

James Hadfield, a discharged soldier, owing to wounds received in the head in battle, had become liable to acute attacks of mania, yet he went about his ordinary avocations without hindrance until he shot at the King (George III) on the 15th May, 1800. His counsel, Erskine, had said of him: "He was affected from the very beginning with that species of madness which from violent agitation fills the mind with the most inconceivable imaginations, wholly unfitting it for all dealing with human affairs according to the sober estimate and standard of reason":[2] in other words, he should have been known to have lost control of his actions. The control of conduct and the knowledge of right and wrong are, according to Sir James Stephen,[3] almost convertible propositions, and may either of them be the test of responsibility according to their application. The difficulty is, however, to know how and when to apply these tests. It does not help matters very much to say, "This power (of knowledge and of control) may be disturbed by delusions or impulses of various kinds" unless you point out a method by which they may be shown to exist in a particular case.

[1] 27 *State Trials*, 1282—1355.
[2] *Ibid.*, 1321.
[3] *General View of the Criminal Law.* 2nd ed., 79, 80.

It is always open to the other side to say, "No, this is not a case of delusion or of uncontrollable impulse, but one of simple depravity": to meet this, one must be prepared with a ready means of ascertaining whether these moral and impulsive insanities, which in their outward appearances are scarcely distinguishable from evil propensity, are to be held to have their origin in irresponsible action.

One might go on quoting cases, but like characteristics will be found to run through them all; one may find, on the one side, brain disease or decay (sometimes complicated with mania or delirium), *e.g.*, *Reg.* v. *Richards* ([1858], 1 F. & F. 87), and *Reg.* v. *Vyse* ([1862], 2 F. & F. 247); in the one case, an old woman killing her husband, in the other a mother poisoning her children); and, on the other side, mental disorders or hereditary taint (where the decision has to be taken generally as between depravity and insanity, *e.g.*, *Reg* v. *Haynes* (1859); 1 F. and F. 666; *Reg.* v. *Oxford* (1840); 9 Car. and Payne, 525—in the former case there was a conviction; in the latter an acquittal on the ground of insanity). In the one set of cases, as a rule, there is not much room for differences of opinion: it is in the other set of cases that controversies have arisen over so-called Moral and Impulsive insanities. In these illustrations, the endeavour has been made to show that in every case of insanity, whether it be of brain disease or of disordered feeling and action, the true test of responsibility is simply this—was the true self acting or only a part of the self—in the one case, had the brain through disease become a defective medium fcr the conveyance of mental impressions—in the other case, had the spirit so lost control that an insistent idea could be impressed on the organism? In order still further to illustrate this idea, we shall now very briefly review one or two cases that have come before the Scottish Courts.

The statement of the law, as practised in the Scottish

Courts, differs very little from that to be met with under English law and practice. The grounds of exemption from criminal responsibility, where insanity is pleaded in defence, are thus laid down in a Scottish text-book:[1] "Insanity or idiocy exempts from prosecution; but there must be an alienation of reason, such as misleads the judgment, so that the person does not know 'the nature or the quality of the act' he is doing, or, 'if he does know it, that he does not know he is doing what is wrong.' If this exist as connected with the act committed, he is not liable to punishment although otherwise rational. If he kill another when under an insane delusion as to the conduct and character of the person, *e.g.*, believing that he is about to murder him or is an evil spirit, then it matters not that he has a general notion of right and wrong . . . . If there be insanity at the time and the person afterwards recovers, there is still no responsibility. Instances have occurred of one short access of maniacal phrenzy, where there was no recurrence of the mania: such a case of insanity is the most difficult to prove, but if proved it bars punishment." "If alienation exist, it is of no consequence whether it result from a chronic or a temporary cause, nor although the cause have been the accused's own acts of excess; but mere intoxication is no defence." Such a statement of the law, even from an English point of view, leaves very little more to be desired: it has the advantage of adding clearness and precision to the statement of the rules of law as formulated by the judges in the *MacNaghten Case.*[2] It would have been very well if left there: an intelligent application of the law as thus laid down would go far to cover any of the cases of debated responsibility which we are about to refer to. There is, however, a note of doubt and confusion in what follows. To continue the quotation[3]—"The alienation of reason

[1] Macdonald, *Criminal Law of Scotland*, 3rd ed., 10—12.
[2] *MacNaghten's Case* (1843), 10 Cl. & Fin. 200; Stephen, *General View of the Criminal Law of England*, 80, 2nd ed.
[3] Macdonald, *Crim. Law of Scotland*, 3rd ed., 12.

must be substantial: oddness or eccentricity, however marked, or even weakness of mind, will not avail as a defence: even monomania may be insufficient, where the delusion and the crime committed have no connection, or where the person, although having delusions, was yet aware that what he did was wrong: disturbance to the mind is not enough, if the reason be not overthrown." Here the attempt is made, as in the rules prescribed by the English judges in 1843, to strike a common measure between two incommensurable quantities. In certain states of insanity truly, such as dementia, delirium or imbecility, we may meet with mensurable correspondences which go far to fix a standard of responsibility; but, in the various phases of mania, we shall find no common measure between the reasonableness of the cleft self at one moment and its exhibition of vast wickedness at the next.

The first case that we shall refer to, from the annals of the Justiciary Court in Scotland, is that of *Alexr. Milne* (1863),[1] who was charged with the murder of James Patterson by stabbing. After evidence led for the prosecution, the defence produced a variety of exculpatory evidence going to prove the existence of insanity before, at the time of, and after the murder. One peculiarity of this case was, that apparently the prisoner was suspected of simulating madness, and that accordingly two of his fellow prisoners before trial were put into his cell to observe him. Their evidence, so far as can be gathered, seems only to confirm the genuineness of the symptoms of insanity; there was the wakeful condition of the maniac, which cannot be simulated, seldom sleeping for more than three hours; there were persistent delusions; there were the characteristic phantasms of the insane—all this seems to have left little impression upon the jury. Three medical witnesses spoke to the existence of delusions: their impression was that the

[1] 4 Irvine's Reports, 301.

prisoner was not feigning madness. A point seems to have been made, that there was no connection traceable between the murder and the delusions. Now, one of the alleged delusions had been that a conspiracy had been hatched to poison him and to possess his wife; yet, the same medical witness, who "did not find any connection between" the two, admitted that he "thought the act of homicide was committed to get rid of the conspirator the poisoner and the seducer of his wife": that he "formed this opinion from what came out in the whole course of the conversation." The same witness was asked the question—"Is it not a possible condition of the mind in monomania that the patient might be well aware of the nature of the crime, and that he would suffer for it, and yet might feel irresistibly compelled to commit the crime?" The witness answered the question in the negative—the presiding judge having interposed, by saying, "If all the physicians in Europe were to state that, I would tell the jury that they must not believe it or act on it."[1] The Lord Justice Clerk (Inglis) evidently was a robust disbeliever in anything he did not himself understand. From the evidence of friends who had known him for periods ranging from two to ten years, it appeared that the prisoner had been very strange in his demeanour for some years. Robert Moodie, who had known the prisoner for about ten years, deposed that he had lived in the same lodging with him before his marriage and had been his "best man"; that he was bankrupt in 1860; that there was a marked *change* in him after his bankruptcy—that he himself "became frightened at him after his bankruptcy." The witness, continuing—"On the evening of the publication of his bankruptcy I met him with a revolver . . . . I took him home . . . . I tried to console him about his bankruptcy; he said, "Oh, Moodie, I shall go mad." Other witnesses spoke of the prisoner's delusions of robbers,

[1] *See* p. 30.

of poisoners, of seeing spirits. John Smith, who had known prisoner for five or six years, deposed that prisoner had said to him that he knew he would be both robbed and murdered. The witness continued—"I tried to persuade the prisoner out of it, but did not succeed . . . . On Wednesday morning [the day of the murder] . . . . I got a message from the prisoner . . . . asking me to go over to his shop and see him: I did not go, for I did not think it was safe to go near him." The Lord Justice Clerk, after having gone over the evidence to the jury, said—"The doctrine of criminal responsibility is exceedingly simple. If a person knows what he is doing—that is to say, if he knows the act that he is committing, if he knows also the true nature and quality of the act and apprehends and appreciates its consequences and effects—that man is responsible for what he does. If, from the operation of mental disease, he does not know what he is doing; or if, although he knows what is the act that he is performing, he cannot appreciate or understand either its nature or its quality, its consequences or its effects; then he is not responsible." Verdict of the majority, guilty; sentence of death, afterwards commuted to penal servitude for life.

What strikes one forcibly in reading the report of the evidence in this case is, that the whole case turns on the genuineness of the delusions. All the witnesses —medical as well as ordinary—testified to the presence of delusions, the most persistent of which was that he was being conspired against to be robbed and murdered, and that he had connected this in his mind with the prisoner: it appeared that the trap laid for the prisoner while awaiting trial tended only to confirm the genuineness of these delusions; and yet they appear to have been paid very little attention to either by the judge or jury. If the jury had been directed to the reading of the rules of law, as laid down in the text-book of the Criminal law of

Scotland just quoted,[1] they would have seen it there stated—"If (the person charged) kill another when under an insane delusion as to the conduct and character of the person, *e.g.*, believing that he is about to murder him or is an evil spirit, then it matters not that he has a general notion of right and wrong."

The manner of charging the jury in such cases, mostly in vogue since 1843, apparently in the Scottish equally with the English Courts, seems therefore, not only to fail in directing the minds of the jury to the real issue of responsibility or irresponsibility, but positively to divert them into a wrong channel. The crucial tests of irresponsibility in the case of an apparently duplex personality—of evil warring against the good, of states of depravity and of insanity almost indistinguishable the one from the other—have already been pointed out: we have them here, all present, in this case of Alexander Milne. There is, first of all, the deep and lasting "change" spoken of by the most intimate friend of the prisoner; secondly, we have the state of doubt hardening into the insistent idea; and thirdly, we have "possession," the complete control of the organism in the carrying out of a suggestion—the fixed idea or delusion.

Another case that we shall refer to need not detain us long: like lessons are to be learnt from it. It is that of *George Bryce* (1864)[2] who was tried for the murder of Jane Seaton, a domestic servant, by cutting her throat. The prisoner having pleaded not guilty, the facts were proved against him. Evidence was led for the defence, to show a certain low organisation almost amounting to imbecility—latterly, he had been given to drinking when he became furious; a year ago, a change seemed to have come over him, he spoke thickly and unintelligently; he was deficient

[1] Macdonald, *Criminal Law of Scotland*, 10—12.
[2] 4 Irvine's Reports, 506.

in memory, after the murder he did not seem to know that it had been committed. Two medical gentlemen testified to their belief in the prisoner's insanity. The attempt was made to show that he had committed the act under the influence of a delusion: the only evidence of delusion that could be produced was his belief in the fact of his victim having slandered him—"the only delusion proved was the delusion he was labouring under, in believing that a man of the name of Peat had told him that Jane Seaton [the murdered girl] had said he was a drunken blackguard"—this was pronounced by the medical witnesses to be a delusion. It is explained by the first medical witness in this way:—"It is a very common delusion that one has been slandered . . . . when a man broods over a fancied wrong, it becomes a delusion: it would produce a feeling of enmity, and might lead to a fit of maniacal excitement under which he might cut his neighbour's throat." This seems to be a begging of the whole question that has to be proved, namely, the existence of the delusion and the consequent mania. The Lord Justice-General (Right Hon. Duncan McNeill), in charging the jury, pointed out that " . . . . a man labouring under a mistaken belief respecting himself is not necessarily insane: a man believing that another has an ill-will towards him is not therefore insane however ill-founded the notion may be . . . . delusions of that kind are not such as will screen a person who on acting upon them has perpetrated a crime: if you choose to call that insanity, still it will not do: it is not an insanity of this kind that will be a defence against the consequences of such an act as this." The allegation, moreover, of the prisoner having no recollection of what he did after the commission of the crime, is not substantiated: the prisoner, when pursued and taken, had remarked to the constable—"She is cheap of what she has gotten," and he asked if she was dead. The jury returned a verdict of

guilty, with a recommendation to mercy on account of the low mental organisation of the prisoner—in respect of which verdict the prisoner was sentenced to death.

The important thing to be learned from this case is, that again the Defence took the wrong course. The leading feature in the case is the mental deficiency of the prisoner: and the right course should have been to endeavour to show, if it were thought proper to plead insanity, that the degeneracy succeeding the changes marked by the medical witnesses had become so great that the prisoner was no longer able to distinguish between right and wrong; and, failing in this, which was the only real issue, the Defence quite properly broke down.

The medical witnesses tried to prove too much. It was quite sufficient if they could have shown that the man, originally deficient of mental powers, had steadily degenerated until at least a twelvemonth ago he ought to have been taken care of in place of being allowed to wander at large: the evidence seems to have gone at least as far as this. They endeavour to support two distinct propositions regarding the insanity of the prisoner: in the words of the first medical witness: "I think he was labouring under a fit of maniacal excitement . . . . I consider that, about twelve months ago, he began to suffer a further change of a marked kind, which we term 'chronic dementia,' and which, in similar cases, has been observed to pass into complete dementia"; and, in the words of the second medical witness, "I do not think the prisoner was of sound mind at the time he committed the act in question: I think he was under a maniacal paroxysm . . . . The progressive indication afforded by his leaving his horse and cart, his gazing to the skies, his muttering to himself, lead me to think that he was gradually becoming insane—the disease appeared to progress: from the evidence, and from what I have seen in my own examinations, I think that the case

would gradually progress towards dementia." Under cross-examination, the same witness stated: "Dementia is one of the three forms or divisions of insanity—mania, monomania, and dementia: I consider prisoner to be a monomaniac and was so on the 16th April [day of the murder]. I think he became so about a year ago. I think that the subject of his monomania has always been the same—the same delusion, namely, the delusion that Jane Seaton had made certain statements regarding him and which apparently she never made.. I am not aware of any other delusion—no proof of any others, though I suspect there were others . . . . Delusion is an essential of the monomania . . . . the muttering to himself also indicates delusion (the witness had previously stated this to be a symptom of progress in dementia) . . . . There is no fact in the case to lead me as a medical man to the conclusion that his mind was not competent to understand the state of the circumstances . . . . " It is difficult to see why the Defence should have thus weighted their case all through by an endeavour to run dementia and monomania together: by imagining a condition of monomania—of which there was no proof, and by failing to show delusion, their case was lost. There was, however, abundance of proof of a progressive deterioration which, as the event showed, had reached a dangerous stage. The question arises—is there anything to distinguish this case from one of sheer depravity? will any theory of irresistible impulse or moral insanity avail? Truly there are evidences of a *change* followed by degeneration, but this seems uniform and consistent; there is no struggling against the evil, no efforts at resistance; there may be a downward progress towards dementia, but there is no apparent split in the personality whereby a man is driven one way by insistent ideas, when his true and better self would go another.

These instances may perhaps suffice to illustrate the working of the principle that has been laid down. One

might stop here; but there is a case that may be mentioned, on account of the statement of the law contained in it, as coming from the lips of a high judicial authority. In the case of *Andrew Brown* (1866),[1] the Lord Justice Clerk, (Inglis) in addressing the jury, went on to say—"The main question for the jury to consider was . . . . whether the prisoner was in such a state of insanity at the time as not to be responsible for the act which he had committed . . . . But, in order to constitute this insanity, it must be clearly made out that at the time of committing the act the prisoner was labouring under mental disease in the proper sense of the term, and that the mental disease was the cause of the act . . . . Nothing but mental disease which overpowered the reason constituted insanity in the eye of the law." In this last qualification of "mental disease" lies all the difficulty: "mental disease which overpowered the reason," or, "mental disease [which] was the cause of the act"—which is it to be? These two formal propositions have doubtless many times been taken to mean the same thing—that the one is but an explanation of the other; but they are very different. In the first place, "mental disease" must be taken to mean something more than brain disease: there may be mental disease, and yet no symptoms of brain disease: as has already been pointed out, this confusion of mental with brain disease has been one of the causes of misunderstanding. Then, in the second place, how can mental disease be properly said to be "the cause of the act?" The *will* is the cause of the act: the question therefore is—was the will free to act; if not, one has to inquire what prevented the freedom of the will—was it disease, or lack of reason, or some other cause? The endeavour has been made throughout this treatise to show that precisely the same rules of law should apply in

[1] 5 *Irvine's Reports*, 215—218. The report of the case sets out neither the prisoner's declaration nor any evidence for the defence.

treating of the responsibility of the sane and of the insane; and that confusion and difficulty have arisen from the notion that some special rules should prevail in the trial of cases in which insanity has been pleaded. It is manifest that such a defect of reason . . . . as not to know the nature and quality of the act[1] is not an adequate test of responsibility, unless the will to do a crime follows upon a knowledge of the nature of the act as an irrebuttable proposition. To see that this is not so, one has only to look into the meaning and effect of the presumptions of law affecting responsibility for the commission of offences.[2] It is quite possible for a sane person, and it may be highly probable in the case of an insane person under certain conditions of insanity, to be so circumstanced that the person (notwithstanding the *dictum* of an eminent judge)[3] "might be well aware of the nature of a crime . . . . and yet might feel irresistibly compelled to commit" it.

XII.

What remedy, then, is there for these insanities: by what methods may they be countervailed: faith may effect cures on the body; but, when faith is not, what are we to do? There is no cross-road from wrong-going to right-going; we must retrace our steps till we find the right road; where the suggestions have been evil, let them be good: where fixed ideas have taken possession, they may be exorcised only by the stronger power of the reunited self:[4] what is required is a reconstituted faith, as the sign of intensified spiritual life—the resumption of control by the true self. These mental distractions can be cured only by psychological methods: we want a true philosophy, a true religion.

[1] *McNaghten's Case:* Answers of the Judges to Questions I and III.
[2] Harris, *Principles of the Criminal Law:* Presumptions.
[3] *Alex. Milne's Case*, see p. 28.
[4] Myers, *Human Personality*, Vol. I, 41 2, 219.

Man is the maker of religions: he is not satisfied with the simple one given to all mankind: a man is limited by his religion, by the faith that is in him—how necessary, then, that our religion, our philosophy, should be simple, should be true! Truth is hard to find; but, when found, it has ever these two characteristics—it tends towards unity, it tends towards simplicity.

There are two evolutionary forces ever acting on the development of man's character—the *realism* of his surroundings, and the *idealism* of his philosophic and religious aspirations: the development of his nature depends on the way the one force has acted and is acting on the other. It is a salutary thing for men to be dissatisfied with their lot, but the important thing is the quality of the ideal which they form for themselves as a working faith in the future. The responsibility for the formation of a true and high ideal lies at the door of every individual, even as it concerns the public safety and the very existence of the State. When that ideal is low—such as in the abject materialism of the Socialist—the descent may be sudden and profound; but, short of this, we see around us many false ideals, each striving for the mastery. One is led thus to discern a distinct cleavage—running up and down throughout all the departments of human affairs—into two great sections of society as it at present exists; there is that section whose aim and ideal is mainly material in its tendency, and there is that other section whose aim and ideal is mainly spiritual in its tendency; and the contrast becomes very marked in the methods by which they are wont respectively to endeavour to attain their ends. Only when the mutual realization of inter-dependent interests "is assured does the moral life begin . . . . The world of appreciation is, then, the deeper reality; its rival, the world of description, is the result of an essentially human and finite outlook."[1]

[1] Royce, *Spirit of Modern Philosophy*, 368—415.

It seems apparent, then, that man in the formation of his character may follow either a higher or a lower bent; and the phenomena of sub-conscious and super-conscious states[1] would lead one to suppose that the conscious life of man is never wholly void of spiritual control, and that man may be inspired to what is evil and base as well as to what is good and noble. It seems scarcely doubtful that from this point of view alone can some of the phenomena of insanity meet with a satisfactory explanation.

Mind causes, is not caused. The mind of man must therefore be an emanation from the supreme mind:[2] in this we have the guarantee of freedom of will; but, when the mind of man is split up and the spirit no longer holds control, freedom has given way to necessity and the creature is possessed. In respect of spiritual insight alone do we ever reach final truth; the lower faculties of the mind can but show us phases of the truth, by aid of which and subject to the laws of physical causation the natural man learns enough to serve his turn. The evolutionist[3] is content "to look for a plan embodied in a physical sequence"; he is convinced that "the absolute self simply does not *cause* the world"; that "the very idea of causation belongs to things of finite experience": in pleading ignorance of first causes, he affirms the principle of evolution, and is very "clear about the self." Here, then, are two absolutes—evolution with a plan of its own and an absolute self outside of that plan: how are we to reconcile them? If it can be established[4] "that an idealistic interpretation of the physical world" requires "the theory of one absolute self as the truth embodied in both nature and mind," how are we to account "for the suggestion of plans" working independently under "the most rigid and necessary causal sequences of nature":

[1] Wm. James, LL.D., *Varieties of Religious Experience*, 398—511.
[2] Royce, *Spirit of Modern Philosophy*, 340, 345, 348, 351, 409, &c.
[3] *Ibid.*, 422-8, 347—350.
[4] *Ibid.*, 340, 368, 423, 348, 422, 426.

how are we to account for the fact that the physical world, in showing us a plan, "*expresses* a world will but is not subject to the interference of this will"? We have the answer—"The student of evolution finds the world mechanical . . . . but he finds the world also teleological . . . . and as the appreciable is deeper and truer than the describable . . . . so the student of evolution, in thus viewing the world . . . . of ideals that long for realisation, is coming nearer to the truth of things than is he who merely describes the necessary sequence of time." Although it is true that every interpretation of nature or of inner life is fragmentary and hypothetical: "it is nevertheless true that in both cases interpretation in appreciative terms is deeper than mere description of phenomena, and is more likely to get at the truth of things." It will not do, however, to say—"The real world must be a mind or else a group of minds." The physical universe is but a manifestation of mind; "for, as we now see, all describable truth is an outward symbol of an appreciable truth." The difference is all the difference between pantheism and monotheism.

There is, then. an appreciative way of looking at things even as there is a descriptive; and these separate methods will correspond to the spiritual and to the material tendencies which are ever warring for the mastery.

There has been a recent essay in Philosophy[1] to elaborate the empirical method in the conduct of human affairs, at the expense of the rational, into a general principle of action. Pragmatism, by the simple process of arrogating for Empiricism what it derogates from Rationalism, is able to create for itself a new philosophy which within its ample folds will gather up and deck out in modern finery all the infidelities of the ages. By aid of an application to the realities and idealities of life of the scientific method of observation and verification, it affects to have found a

[1] William James, *Pragmatism; a new name for some old way of thinking*, 1907.

theory or criterion of truth which will form a philosophic basis for the outpourings of present-day materialism. Under the midway doctrine of meliorism, we may cherish our own ideals—these ideals "are *live* possibilities" which have to wait for actuality upon "complementary conditions . . . . such a mixture of things as will in the fulness of time give us a chance, a gap that we can spring into," and then by *our act* we find salvation.[1]

"*Why not?* Our acts, our turning places . . . . are the parts of the world to which we are closest, the parts of which our knowledge is the most intimate and complete . . . . why may they not be the actual turning-places and growing-places, which they seem to be, of the world . . . . so that nowhere may the world grow in any other kind of way than this? Irrational! we are told . . . . There must be a reason for our acts, and where in the last resort can any reason be looked for save in the material pressure or the logical compulsion of the total nature of the world?" If Pragmatism be true then, we are the creatures of necessity—scarcely sane; for, in the last resort, can there be any reason for our acts save in the material pressure of our surroundings!

Having ascertained that "laws and languages at any rate are . . . . man-made things,"[2] Pragmatism proposes the name of 'Humarism' for the doctrine that to an unascertainable extent our truths are man-made products too . . . . All our truths are beliefs about 'Reality.'" The Pragmatist cuts up Reality into three parts—first, into "the flux of our sensations"; secondly, into "the *relations* which obtain between our sensations or between their copies in our minds," and, thirdly, into "the *previous truths* of which every new inquiry takes account." He then goes on to say—"Now, however fixed these elements of reality may be, we still have a certain freedom in our dealings with them.

[1] William James, *Pragmatism*, 286-8. [2] *Ibid.*, 242-51, 201, 212.

. . . . Every hour brings its new precepts, its own facts of sensation and relation, to be truly taken account of; but the whole of our *past* dealings with such facts is already founded in the previous truths. It is therefore only the smallest and recentest fraction of the first two parts of reality that comes to us without the human touch; and that fraction has immediately to become humanised in the sense of being squared, assimilated, or in some way adapted to the humanized mass already there. As a matter of fact, we can hardly take in an impression at all in the absence of a preconception of what impressions there may possibly be." Truth, this man-made product of the Pragmatist, then turns out to be something of which Empiricism can take little account until it has become assimilated and adapted by "a preconception of what impressions there may possibly be," and without which "we can hardly take in an impression at all." We have here then, in this "preconception" of the Pragmatist, all that the Rationalist contends for—we have admittedly those elements of reason without which experience is impossible, that rational power which is the ultimate test of truth.

The treatment of the subject of legal responsibility would not be complete without some reference to the prevention and punishment of criminal offences. Few will be found to maintain that the existing prison system, however admirably administered it may be, is well calculated for the reform of the criminal: and this ought to be the main object of prison discipline. The first need is that the public conscience should be roused to a perception of common responsibility for the existence of crime in the midst of a civilised community, and then one may hope for greater advances being made towards discrimination in the treatment of prisoners. Except in cases of serious crime or of incorrigible offenders, the treatment should scarcely differ from that meted out to the insane: that is to say, the object of the treatment should

be directed mainly towards reformation of character, and to this end each case should have separate consideration and appropriate treatment—utilising to the utmost extent the several aptitudes of the individual in mental and bodily training.

RANKINE WILSON.

(Concluded.)

VI.—CURRENT NOTES ON INTERNATIONAL LAW.

Jurisdiction.

IN allowing that the Court, while it will not issue decrees directly affecting foreign immovables, will nevertheless enforce personal duties in regard to foreign immovables, the law appears to introduce a large exception to the general rule laid down of non-interference. If the Court can enforce all kinds of rights and duties in respect of foreign land, by the use of its personal jurisdiction, there seems to be nothing left which it cannot accomplish. In name it modestly appears to refrain from announcing that A.'s French land is B.'s. In fact, it protects B. as the owner, so far as B. complains of the acts of people over whom it has jurisdiction. And what more, in any event, could it do?

The limits of the principle, nowhere very clearly defined, may perhaps be inferred from the judgment of Parker, J., in *Deschamps* v. *Miller* ([1908], 1 Ch. 856). The case discloses a curious history. One Deschamps married a French lady in 1831, and in 1836 went to India and married a Miss Cecilia Taylor, with whom he lived for many years, and on whom, in 1865, 1866 and 1869, he settled various parcels of land situated in Madras. He died in 1885, and his deserted French wife died in 1890.

Her representatives then brought this action to have it declared that the settlements were invalid as against her, according to the terms of her marriage-contract. But—"In my opinion," said Parker, J., "the general rule is that the Court will not adjudicate on questions relating to the title to, or the right to the immediate possession of, immovable property out of the jurisdiction. There are no doubt exceptions to the rule, but without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit, of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of equity in this country, would be unconscionable; and do not depend for their existence on the law of the *locus* of the immovable property." His Lordship goes on to say, that in cases of trust, specific performance, mortgage or fraud, jurisdiction might be assumed. But what is this but to admit a roving jurisdiction to apply the peculiar English principles of trust and standards of conduct to dealings with foreign land—to which they might be totally inapplicable? If Germany does not recognise trusts of land, are we to send a German to jail until he does? or to sequestrate his property until he does?

In point of fact, the whole doctrine of jurisdiction is urgently in need of examination, as we showed when treating the case of *Norton* v. *Norton* (*L. M. & R.*, Aug. 1908, p. 464).

Lex soli (scilicet, pecuniæ).

We only refer to the case of *Stirling* ([1908], 2 Ch. 344), which attracted so much attention in the lay press, for the purpose of drawing our readers' notice to two points. *First*, that the learned judge went out of his way to suggest that a British Court would refuse to recognise a divorce in the

domicile, if it passed upon grounds which it would not itself recognise: a suggestion which receives no support whatever from the current of authority. *Secondly*, that it seems to have been supposed throughout by everyone engaged in the case, that the law of Scotland must primarily apply, because the subject-matter of the action was stock directed to be laid out in lands in Scotland. This was to anticipate. Before the obviously technical rule of English equity, which converts cash and securities into notional acres and herbage, can be applied, the law primarily applicable must be settled. It is because of the practical awkwardness of purporting to apply any but the foreign law to actual foreign land that the doctrine has been laid down that the ownership of land must be governed by the local law. No such practical inconvenience existed here, where cash and securities were alone actually in question.

The true ground on which the reference to the law of Scotland must be put is, that the case was simply one of the construction of a will—and that the construction had to be that of the deceased's last domicile.

Japanese Cases.

In regard to the difficulty which seems to have been felt by the Japanese authorities with respect to the disposition of the *Daijin*,[1] recaptured by a private ship, we may cite the opinion of Sir J. Cooke, K.A. (1708), that in the case of capture by a non-commissioned vessel, proceedings should be taken to have the captured ship condemned as a perquisite of the Admiralty (Forsyth, *Cases and Opinions*, p. 93). And with reference to the condemnation of a Russian ship (the *Thalia*),[2] which was on a building slip in Japan, we may cite the opinions of Marriott, K.A., and De Grey, A.-G. (1770), that ships on the ooze are within municipal and not

[1] Takahashi, *Russo-Japanese War*, p. 339. [2] *Ib.*, p. 605.

admiralty jurisdiction.[1] If these opinions are correct, the *Thalia* needed no condemnation, and there need have been no difficulty about proceeding against the *Daijin*.

The Casablanca Incident.

Some time ago (May, 1906) it was observed in these pages that the Moroccan proposals of the Algeciras Conference were admirably calculated to lead to friction. The policy of superseding the home authorities by a joint control of foreign composition is never a good one: it failed in Mexico, it broke down in Egypt. It is not succeeding in Morocco. Much the preferable plan is to support even an indifferent native ruler. The Algeciras project was to enforce order in the coast towns by a mixed gendarmerie under the command of a Swiss. The force has been duly organised, but even in this incipient state it has developed a canker. One would have thought that for so delicate a service the most carefully selected men would have been employed. Some, at any rate, of the troops appear to have been far from satisfactory in *morale*. There has been disaffection—how fomented, it is impossible to say—culminating in frequent desertions. Allegations of the existence of a regular desertion agency have been made; and out of an attempted desertion the Casablanca incident arose. Colour is given to the charge that Germans are accountable for this unsatisfactory state of things, by a subsequent occurrence; a band of Germans, under a lieutenant, mutinied and started an independent career (which met with an early and fatal termination). The difficulty at Casablanca arose from an attempt at desertion which a French officer was attempting forcibly to suppress. An official of the German Consulate was alleged to be giving the deserters active assistance, and to have been threatened by the French officer with a revolver.

[1] *Cf. Scratton* v. *Brown* (4 B. & C. 485).

Hence two claims:—A German claim for an apology for the violence offered to the consular officer (who in an Eastern country is clothed with a certain diplomatic character); a French claim for satisfaction for his alleged improper aid to deserters. The German peremptory demand was made that an apology for the violation of consular privilege should precede all inquiry as to the propriety or otherwise of the consul's conduct. The reasoning seems to have been that the fact that he had been threatened was clear and undisputed. Nothing could justify it, though it might, coupled with an apology, excuse it. France declined to put even an Oriental consul's privileges so high. She maintained that he might lose or impair them by misbehaviour, and consequently that her liability must be measured by the decision of the question of his alleged misconduct. If it was not sufficient to excuse her, she was willing to undertake to apologise; and on this basis a satisfactory formula of adjustment was settled. Each party undertook to apologise if found to have been in the wrong, and in the meantime, as a concession to German sentiment, France agreed to join Germany in an expression of regret that the events causing the dispute had ever happened. without accepting or attempting to apportion the blame. The decision of the points undecided was left to the Hague tribunal.

Personal Law.

The President of the Divorce Division has followed up his success in *Ogden* v. *Ogden* by a decision on precisely the same lines, denying the validity of the personal statute, in a case of *Venugopal Chetti* (*Times*, Dec. 8, 1908). Here it was not a minor Frenchman, but a Brahmin Indian, who came over and "married" a domiciled English person in England. He alleged that by the law of his Indian domicile he was incapable of marriage with an

outcaste. The learned President was not clear that he had proved his subjection to so exclusive a law; but if he was so subject, he nevertheless held that it did not follow him to England. A judicial separation was moreover granted, his Lordship considering that there was constructive desertion, created by the respondent's declaration that he regarded himself as at liberty to take additional partners in his household.

An able Indian contemporary observes:—"If the telegraphic summary of Sir Gorell Barnes' judgment is correct, the decision will provoke not a little hilarity in this country." But may it not well be supported on the ground that a polygamous union, such as the defendant's personal law contemplated, is an entirely different sort of institution from European marriage? In that case, the prohibitions of the personal law would not apply (being made *alio intuitu*). And, if it is answered that it prohibits marriage of the European type altogether, is not the rejoinder valid, that the English Courts will not give effect to such a prohibition? We may refer generally on the topic to our notes in this Magazine for May 1907, p. 337, and February 1908, p. 218.

Holland v. Venezuela.

The Dutch action in Venezuela does not merit the highest commendation. Whatever might be the grievances of the Netherlands, the embargo of the Venezuelan navy was not the ideal way to set them right. If it was dictated by a desire to repay themselves some definite loss (or if it had been effected in Dutch waters), it would be a legitimate form of reprisals. But it seems to have been directed to something much more than the mere taking of security for liquidated damages. It appears to have been designed to cripple an independent government in its maintenance of a coastguard service, merely because Holland (very likely

rightly) thought that it was not treating her commerce fairly. The seizure of the *Alexis* and *Twenty-fifth of May* (not to be confused with the Elswick-Argentine cruiser of the same name), therefore appears calculated only to have exasperated the situation. It may be counted to the Dutch Government for righteousness that they did not affect to interfere with private vessels, which would amount to establishing that *juristische monstrum*, a so-called "pacific blockade." For the rest, their attitude was very correct: they did not assume to seize, but only to sequestrate, the captured vessels.

Foreign Rulers Abroad.

The tour of ex-President Castro raised in a somewhat acute form the question of the immunities of foreign rulers within the territory of a State. There is no question that the territorial State can decline to receive them, and that it may attach such conditions to their reception as it thinks fit. But, assuming this to be the general rule for its behaviour, can it impose derogatory conditions, and can it discriminate? The questions must probably be answered in the affirmative. A State is the judge of its own honour; if its chief magistrate likes to submit to restrictions on his conduct and behaviour, as a condition of entering foreign territory, there can be no complaint of their imposition. It would, again, be impolitic to insist that if a given State receives one sovereign unconditionally, it lays itself open to the necessity of so receiving all. Such a rule would go far beyond what has been usual in practice, and it is not required by theory. The equality of States in sovereignty does not infer equality in privileges. It has, indeed, been customary for the presidents of minor States to dispense with ceremony in making visits. Thus President Barclay, of Liberia, came to London recently with no more state than his Foreign Secretary. We are not certain whether

his flag was saluted with presidential honours on his arrival. It may be doubted whether it is entirely wise of the smaller States to sink the observance of these symbols of respect. President Castro was, it may be remarked, admitted to Spanish, French and German territory, under conditions which still remain obscure. It would certainly have been a somewhat petty act on the part of any of these States to have thrown obstacles in the way of the ex-President's medical treatment, on the ground of old and unpaid scores.

Alberic Gentili.

Professor Holland, K.C., may feel legitimate pride in the celebration which took place in September last at the birthplace of Gentili. The movement set on foot thirty-four years ago for the recognition of that jurist's greatness reached its full development last year in the inauguration of a bronze statue in his native town of San Genesio (Ancona). In his *Studies in International Law* (1898) the Chichele Professor remarks that such a statue was projected at Macerata in 1875, but "not yet erected." The English memorial was completed in 1877. It takes the form of a mural tablet in the north-east corner of Saint Helen's, Bishopsgate Street (where Gentili is buried), and was the pious work of Oxford law professors and of the Oxford remnant of the Faculty of Advocates. The Italian statue is now duly forthcoming. It represents Gentili in Oxonian habit, lecturing from notes. In deference to modern sentiment, a bas-relief of Peace decorates this image of the author of *De Jure Belli*. The Royal Minister of Education was present at the unveiling, and so also was Professor Holland, to whom the revival of interest in Gentili is entirely due, and whose elaborate edition of the *De Jure Belli* will doubtless be the Oxford Italian's most enduring and conspicuous monument.

The work of Gentili as a forerunner of Grotius is beyond

dispute. Grotius's first and third books, we are told, derive their model or framework from his predecessor's principal treatise. A Catholic by birth, and a refugee Protestant by conviction, Gentili was able to combine the practical results arrived at by his Catholic predecessors with the theoretic grounds of extra-municipal obligation which the independent existence of Protestantism postulated. It is one of the claims of Archbishop Matthews of York to grateful remembrance that he was partly—"*per te unum*," Gentili says—instrumental in procuring a good reception for Gentili at Oxford, which university incorporated him by special decree in 1580 from Perugia. That he was not Grotius's equal does not make it any the less true that Grotius was a good deal in his debt.

An interesting estimate of his work by Sir Travers Twiss appeared in this magazine (February, 1878). Sir Travers regards Gentili as more cramped than Grotius was by the spirit of forensic legalism. We are not sure that this trait was in all respects a fault: it was rather to some extent an anticipation of the work which Wolff and Möser accomplished in correcting Grotius's tendency to neglect the logic of facts, by a greater infusion of forensic methods into the treatment of the subject.

Contraband Persons.

Persons were regarded as contraband in many old treaties. Thus, in the Swedo-Dutch treaty of 1614, the Franco-Dutch treaty of 1640, the Swedo-British treaty of 1656, the Franco-British treaty of 1655, the Hispano-British treaty of 1667, and as lately as in the Swedo-British treaty of 1803, "troops" figure in company with guns, swords, saddles and sulphur, as absolute contraband. The more recent tendency has been to assert that persons can in no case be contraband. In the *Trent Case*, Great Britain maintained that the United States were setting up a novel and preposterous claim in treating

Messrs. Slidell and Mason as "contraband." And the doctrine is in recent treatises put forward, that the transport of belligerent persons is not the carriage of contraband, but the much more serious act of entering the transport service of the enemy.

In the cases in which Lord Stowell condemned ships for the carriage of belligerent persons, it was never the mere fact of carriage that enured to condemnation; it was the fact that the ships had been hired by the enemy for that very purpose which was fatal—a very different thing. The *Orozembo* was not condemned because she was carrying high Dutch officials as passengers, but because she must have been chartered to carry them. "I have no hesitation in pronouncing," said Lord Stowell (6 C. Robins., at p. 439), "that this vessel is liable to be considered as a transport, let out in the service of the Government of Holland, and that it is, as such, subject to condemnation." That could not have been said of the *Trent*. *The Caroline* (4 *Ibid.* 258) is equally a case of chartering, or rather commandeering, by a belligerent. Therefore, Hall's criticism of these cases as unduly harsh towards the neutral owner, whose master was the victim of the belligerent's force (*The Caroline*) or fraud (*The Orozembo*), loses a good deal of its weight. In neither case was the ship condemned for carrying enemy passengers. In both, the vessel virtually entered the service of the enemy. It is unnecessary for the master to prove his innocence where all he has done is to take one or two casual passengers. He cannot be heard to prove his innocence where his vessel has obviously acted as a hired transport, though he may have been deceived as to who was the hirer. The case in which he *may* have to prove his innocence is that in which he has carried enemy despatches. And the reason is plain. They are so easily hidden, that it can never be obvious that the ship has been chartered on purpose to carry them.

Certainly the mere fact of passengers being belligerent officers, and known to be such, would not suffice to condemn a general ship. "It is asked," says Stowell, in *The Friendship* (6 *Ibid.*, at p. 428), "'Will you lay down a principle that may be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home in a neutral vessel from America to Europe?' *If he was going merely as an ordinary passenger, as other passengers do*, and at his own expense, the question would present itself in a very different form. Neither this Court, nor any other British tribunal, has ever laid down the principle to that extent." The case before him, he adds, "is the case of a vessel letting herself out in a distinct manner, under a contract with the enemy's Government, to carry a number of persons, described as being in the service of the enemy . . . . ."

Exactly on all fours with the case of the *Friendship* was the case of the *Nigretia* (*Yangtze* v. *Indemnity, &c. Co.* [1908], 2 K. B. 504). In the course of the Japan war, she was condemned in Japan for transporting two Russian officers, expressly on this ground, that she had evidently been hired for the purpose. The decision was not rightly appreciated in England, and it seems to have been thought that she had been condemned for carriage of contraband. As she had been expressly warranted free from contraband (on account of some question as to whether her cargo of petroleum might not possibly be treated as such by the combatant navies), her insurers resisted the claim of her owners on their policy, on the plea that she had carried contraband persons and thereby broken that warranty. Bigham, J., held that persons could not be contraband, and that, even if the Japanese Court had held that they were (which he doubted), the policy had not been infringed, and that the insurers must pay. This was confirmed on

appeal; and we now learn from Professor Takahashi's book, that the case was not treated in Japan as one of contraband at all, but as one of belligerent hiring.

T. B.

VII.—NOTES ON RECENT CASES (ENGLISH).

IN *Conway* v. *Wade* (L. R. [1908], 2 K. B. 844) the Court of Appeal have said more disparaging things of the Trades Disputes Act than have been uttered by the official voice since Sir J. Lawson Walton's celebrated speech as Attorney-General, when he appealed to the House not to create a privileged class nor remove a sense of responsibility from unions and agents. But apparently neither the then Attorney-General nor the Lord Chancellor, judging by his Lordship's speech of 4th December, 1906, had any impression that "an outsider, a mere busybody," would come within the protection of the Act, provided his interference was in contemplation or furtherance of a trade dispute. Yet the words of the section might well have suggested the interpretation to this effect which the Court of Appeal have put upon them. And, indeed, such a meaning was conjectured a considerable time ago. A remark of Kennedy, L.J., in the case, seems to imply a non-assent to a view expressed by Romer, L.J., in *Giblan* v. *National Amalgamated Labourers* (L. R. [1903], 2 K. B. 600), of the state of the law at the date of that case. Probably the passage referred to is one to the effect that it was not, in Lord Justice Romer's opinion, essential to the success of a plaintiff-workman, who had been displaced from his employment by the act of a trade union, that he should establish a combination of two or more persons to do the acts complained of; but that if a person, by threats to a man's employers, prevents the man from holding his employment, and the design was to carry out some spite against the man or had for its object the

compelling him to pay a debt, then the person is liable to the man for damages consequently suffered. Not improbably this view of Romer, L.J., had an influence which led to the proposal of the clause so strongly opposed by the then Attorney-General, but subsequently adopted by the Government.

As the holder of licensed premises has an accelerated advance to fortune, he must be prepared to surrender something in exchange. For instance, his house is not his castle, and if there is a sound of revelry by night therein, the police may demand entrance. The privilege of entertaining his private friends after closing hours at his own expense was recognised by sect. 30 of the Licensing Act 1874, but if his hospitality is so lavish that any of them are overcome by it, he is liable to conviction, as in *Lawson* v. *Edminson* (L. R. [1908], 2 K. B. 952). So also is he under sect. 17 of the previous Act of 1872, if they play cards for money, for, as Grove, J., said in *Hare* v. *Osborne* (34 L. T. R. [1876], 294), the exemption under sect. 30 of the Act of 1874 does not extend to gambling. By the Licensing (Scotland) Act 1903 there is a condition that the license holder "do not himself be in a state of intoxication on the premises."

The argument that because a man has attached fittings and shafting to the soil of a business building of which he makes no present use, he is therefore not in occupation, so as to be liable for rates, has not carried weight with the Court in *Borwick* v. *Southwark Corporation* (L. R. [1909], 1 K. B. 78). It was admitted that if the same fittings had been merely stored in the building, the owner would have been liable to be assessed. And it was admitted that the premises had never been offered for letting, but were kept to enable the owner, without delay, to carry on his business

therein in the event of other premises in which it was pursued being rendered untenable. This certainly implies occupation.

Overseers, in preparing a valuation list, probably but seldom under-assess a ratepayer's liability; but a ratepayer may often believe that his assessment is too high, and in such a case his remedy is to apply to the Assessment Committee to amend the list. The plaintiff in *Hudson* v. *Rhodes* (L. R. [1909], 1 K. B. 85) did so, and the Assessment Committee, instead of dealing with his application and no more, raised his assessment. But herein they were wrong. The limit of their jurisdiction was either to refuse his application, or to assent to it and amend the list to such a figure below the amount entered in it against his name as they thought fit. In no other respect can they vary the list on an appeal to them by a ratepayer against an assessment on his own premises. But there is one possible case in which the course they wrongly adopted here may be pursued rightly—viz., where an application is made by a ratepayer to raise the assessment of another ratepayer. But on this point the Court refused to express an opinion.

In *Chapman* v. *Smethurst* (L. R. [1909], 1 K. B. 73) Channell, J., said it was difficult to form a confident opinion. But, at any rate, he enforced a good practical rule for persons who as agents sign mercantile instruments and wish to preserve their freedom from personal liability. On a promissory note expressed "I promise to pay" a certain sum to a certain person, the defendant had impressed, by means of a rubber stamp, the name of a company for whose use the money was applied, and added his signature as managing director of the company. Channell, J., in holding that the defendant was liable as principal, pointed out that in cases where the signatory of

such instruments had been held harmless, his position had been defined by some such expression as "for," "on behalf of," the body whom he professed to represent. As the intention of parties to the document must be ascertained solely from the document itself, the greatest care must be exercised in regard to the terms adopted.

T. J. B.

It is rather remarkable that there should be so many as four decisions reported in the Law Reports for November and December on the single, and not always useful, doctrine of conversion. In *In re Dodson, Yates* v. *Morton* (L. R. [1908], 2 Ch. 638), Eve, J., held that an order for the sale of land made in a partition action converts the property from the time the order is made. Accordingly, if one of the parties die before the sale takes place, his share will devolve as personalty. This seems inconsistent with the language of Jessel, M.R., in *Steed* v. *Preece*, L. R. [1874], 18 Eq. 192, where that great judge held that after an order for sale the deceased owner's representatives must take the property as they find it. But Sir George Jessel was often very careless in his language; and in another case, when the precise point arose, he clearly held that the order converts the property from the time it was made (*Wallace* v. *Greenwood*, L. R., 16 Ch. D. 362).

The second is *Burgess* v. *Booth* (L. R. [1908], 2 Ch. 648), which also relates to a point raised in *Steed* v. *Preece* (*supra*), and the effect of an order to sell realty. Though it is not clear that the remark was more than *obiter dictum*, Jessel, M.R., in that case said that where land is rightfully sold under an order of the Court it is converted, even though more is sold than is necessary for the purpose for which the sale was ordered. An Irish case (*Scott* v. *Scott*, 9 L. R., Ir. 367), is to a different effect, and it seems only reasonable

that the Court should not, during the infancy of an owner, alter arbitrarily by its order the prospective rights of his relatives. But the principle laid down in *Steed* v. *Preece* has been consistently adopted in English Courts, and so when Eve, J., now followed *Scott* v. *Scott* (*supra*), the Court of Appeal reversed his decision.

The decision of Eve, J., on the point of law was also reversed in the third case—*In re Lord Grimthorpe, Beckett* v. *Lord Grimthorpe* (L. R. [1908], 2 Ch. 675). In this case his lordship seems to have been misled by the old view that a deed operates to convert from the moment of its execution. There the deceased had on his marriage disentailed freeholds and conveyed the same to trustees upon trust during the life-time of his parents and the survivor of them, to receive certain annual payments, &c., after the death of the survivor, to the use of himself for life and then to trustees for sale and investment, and then to pay an annuity to his wife and portions to his children. The settlor's wife predeceased him and there were no children of the marriage. Eve, J., held that the property was converted by the trust for sale, since, at the time the settlement was executed, the objects for which the trust for sale was created had not failed. The Court of Appeal held that the time to inquire whether the objects of the trust had failed was when the trust for sale arose. If there was no one then entitled to enforce the sale there was no conversion.

Lastly, in *In re Walker, Macintosh-Walker* v. *Walker* (L. R. [1908], 2 Ch. 705), Parker, J., held that a mere direction that personalty should devolve like realty is not sufficient to convert personalty into realty in equity. Only the legislature can attach to personalty the legal attributes of realty, and *vice versâ*. For instance, it has done this with capital moneys arising under the Settled Land Acts, and with

and purchased under the Irish Land Purchase Acts. If a private person wishes to attach foreign attributes to property, he must do so by an imperative trust directing the trustees to change the property from money into land or from land into money.

All these decisions, except *In re Dodson, Yates* v. *Morton* (*supra*), show a laudable desire on the part of the Court to treat property as being in equity what in fact it is. The doctrine of equitable conversion was no doubt useful in permitting land to be dealt with as money, and money to be dealt with as land. But its logical application to acts which were not intended by the parties to convert the property, has done more harm than good. Few testators who are not lawyers realise that when they give to a tenant an option to purchase the freehold land he occupies, they give him also an option to decide who shall have the land or its proceeds—the person to whom the testator had devised it or the testator's residuary legatee. Yet this is the practical result of the rule in *Lawes* v. *Bennett* (1 Cox 667).

A point upon which judicial opinion has been about equally divided has been settled, as far as the Court of Appeal can settle it, by *In re Hadley, Johnson* v. *Hadley* [1909], 1 Ch. 20. The question was whether personalty, over which a testator exercised by his will a general power of appointment, was "property passing to the executor *as such*" within the meaning of that expression as used in sect. 9 (1) of the Finance Act 1894. Certainly such property did not pass to the executor at Common law. It was undoubtedly an asset of the deceased only in a Court of Equity, since all that the testator could appoint was the equitable interest in the property. *Primâ facie*, therefore, it would appear to be equitable assets, and therefore not assets passing to the executor "as such." But the tendency of the decisions was to treat the property as if it

had actually been the property of the testator, and on this ground the Court of Appeal has held that it is legal assets and passes to the executor "as such." The immediate result is, that estate duty on personalty appointed is payable primarily by the executor out of the general estate. But will it enable an executor to retain his debt out of it? If so, it is a pity an extension has been given to that unhappy privilege.

Eve, J.'s, decision in *In re Joseph, Pain* v. *Joseph* (L. R. [1908], 1 Ch. 599) has been reversed (L. R. [1908], 2 Ch. 507). The rule that, where the codicil substitutes gifts for gifts contained in the will, the substituted gifts are subject to the same conditions as the original gifts, was stated correctly enough by Eve, J. But it is subject to many exceptions and limitations, one of the most obvious of which is that both original and substituted gifts must be to the same person. This limitation Eve, J., neglected.

Neville, J.'s, decision in *In re Bruce, Lawford* v. *Bruce* (L. R. [1908], 1 Ch. 850), has also been reversed (L. R. [1908], 2 Ch. 682). The mistake there was in holding that the principle that executors may retain a legacy against a debt owed to the estate by the legatee, even when the debt is statute barred, applied where the legatee never was indebted to the testator, but was merely the residuary legatee of a deceased person who was so indebted, and as against whom the debt was statute barred.

J. A. S.

SCOTCH CASES.

In *Stevenson* v. *Glasgow Corporation* (45 S. L. R. 860), the Corporation was sued for damages for the death of a child who was drowned by falling into an unfenced stream passing

through a public park. In its normal condition the stream was at the place of the accident about a foot and a-half in depth, but in flood it sometimes rose to between three and four feet. The Lord Ordinary (Johnston) sent the case for trial before a jury on an issue of negligence, but on appeal the First Division reversed and held the action irrelevant on the pleadings.

A distinction between the judicial procedure of England and Scotland in matters of proof or trial was pointed out by the Division as influencing the reversal of the Lord Ordinary's judgment. In Scotland, the presiding judge at a trial has not the powers exercised by judges in the English Courts, of withdrawing a case from the jury where the evidence does not amount to a *primâ facie* case of liability. The relevancy of the pursuer's averments must be determined before any part of the case is submitted to a jury, and hence it was necessary to examine the facts as stated and to determine whether, if proved, they showed an actionable wrong.

On the merits, many cases both Scottish and English were examined and either founded on or distinguished, but the general result may be compressed as follows from the opinion of Lord M'Laren. The proprietors of a place of recreation open to the public are bound to give reasonable protection to members of the public against unusual or unseen sources of danger, but in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature, and there is always danger to the individual who may be so unfortunate as to fall into the stream. But it is not generally found necessary to fence the river to prevent children or careless persons from falling into the water. It was not shown that there

was any special danger at the place where the child fell into the water, and the pursuer's averments amounted to no more than this, that the garden is bounded by a running stream which it was the duty of the Corporation to fence. There was no such duty in general. The case of *Hastie* v. *Magistrates of Edinburgh* ([1907], S. C. 1102), where it was held not necessary to fence a piece of ornamental water, was against the pursuer, for the suggested distinction between standing water and running water did not commend itself to the Court. *Indermaur* v. *Dames* ([1866], L. R., 1 C. P. 274), was also referred to in the course of the judgment.

Although an owner of property is entitled to expect his visitors to take reasonable care of themselves, there is still the further question whether provision ought to be made to cover special danger arising from the want of intelligence or immature intelligence of the visiting persons. But in the words of Lord Kinnear—" there is no authority for imposing on the proprietors or managers of public parks a duty to protect children from such risks as are incident to their childhood." On this branch of the case the following decisions were commented on:—*Grant* v. *Caledonian Ry. Co.* ([1870], 9 M. 258); *Hastie* v. *Magistrates of Edinburgh* (*cit. sup.*); *Campbell* v. *Ord* ([1873], 1 R. 149); *Mangan* v. *Atterton* ([1866], L. R., 1 Ex. 239); *Clarke* v. *Chambers* ([1878], L. R., 3 Q. B. D. 327, *per* Cockburn, L.C.-J., at p. 339).

The law of contract received some illustration from *Hong-Kong Dock Co.* v. *Netherton Shipping Co.* (46 S. L. R. 35). A ship damaged by fire had been towed into Singapore. The owners in Glasgow entered into correspondence with a dock company in Hong-Kong and concluded a contract for repair. The ship was to be towed from Singapore to Hong-Kong, but the authorities at Singapore would not

allow her to be put under tow without extensive preliminary repairs. The shipowners now sought to repudiate the contract with the Hong-Kong Company on the ground that by supervening events the ship had become a constructive total loss, and that repair was "commercially impossible." It was argued that the continued existence of the subject and the possibility of performance of the contract were implied conditions, but the Court declined to accept this view and allowed a proof as to the amount of damage. Lord M'Laren said:—"I am not sure that I fully understand what is meant by the phrase 'commercially impossible,' but the best interpretation I can put on the words is that the defenders have discovered that it will be more profitable to sell the ship in its damaged condition than to repair it. It seems to me that this is just another way of saying that it will be more profitable to the defenders to pay damages than to go on with their contract."

We noted last quarter a number of recent Scottish cases affecting the judicial definition of "charity" and "charitable purpose," as applied to testamentary settlements (*ante*, p. 102). To these now falls to be added *Macduff* v. *Spence's Trustees* (46 S. L. R. 135), which was heard before the Extra Division consisting of Lords M'Laren, Pearson and Dundas. The testatrix in this case directed her trustees to apply the interest or annual proceeds of the residue of her estate, "*or so much thereof as they may deem expedient*," towards such charitable purposes within the city or county of Aberdeen as they shall think fit. The attack was made on the ground of uncertainty, because the subject of the bequest was left optional in amount. It was held that the discretion did not invalidate the bequest, and that, if in the future the trustees should fail to distribute the whole of the income, any question thence arising would fall to be determined when it emerged. The case was distinguished

from certain other cases because the trustees were empowered to apply the whole proceeds among a class of charities admitted to be sufficiently defined. There was no practical difficulty in so applying the whole income year by year, and there was no direction or authority given to the trustees to apply any part of the income to a purpose which the law would not countenance. Lord M'Laren expressed the view that "the setting aside of a will on the ground of uncertainty is really a counsel of despair. It is," he said, "an expression of the inability of the Court by approximation to extract the legal meaning from the will or testament. Therefore, it is never to be resorted to if, by the application of reasonably critical methods to the interpretation of the will, we can arrive at a result consistent with the charitable intentions of the testator."

A question of International Maritime law was raised in *Clark* v. *Hine* (45 S. L. R. 879). The action was one of judicial sale of a ship registered in Scotland and situated in Scotland at the date of the action. Among the claimants to a preferential ranking on the proceeds was a firm of ship-brokers in New York, who founded upon advances made by them at the request of the Scottish owners while the vessel was at New York. The sum claimed was £7,537, of which £176 was for advances of seamen's wages and the balance of £7,361 was for repairs to the vessel to enable her to proceed on her voyage. The New York claimants drew a bill for the total amount, which was accepted by the owners, and upon maturity was by arrangement renewed for a further period. The claimants averred that by the law of the United States, and particularly of the State of New York, they were entitled to a lien upon the ship for the advances referred to. This was denied by the other claimants, but the Court held that it was unnecessary to determine

this point as the law of Scotland must prevail, being the country of the ship's flag and also the country in which the action was raised. As regards the advances for repairs there could be no doubt that, according to Scottish law, there was no lien in the absence of a bottomry bond, and as to the advances for seamen's wages it was clear from the circumstances that the claimants trusted to the personal credit of the owners and not to the security of the vessel. It was only on this footing that the bill and particularly its renewal when due could be explained. The authorities were examined in considerable detail, and the judgment thus forms an interesting exposition of this branch of the law. We need only refer to a single passage from the judgment of Lord Kinnear:—"It has been argued," he said, "that according to our law contracts are to be construed according to the *lex loci contractus.* I am unable to admit that there is any general law to that effect. It has been said over and over again in this Court, and in a comparatively recent case in the House of Lords, that the question whether the meaning and effect of a contract is to be determined according to the law of the place where it is made, or of the place where it is to be performed, is according to the law of Scotland a question of intention, to be determined on the construction of the particular contract and not by any absolute rule of law."

R. B.

IRISH CASES.

Probably the most interesting case in the recent numbers of the Irish Reports is *Fitzsimons* v. *Duncan and Kemp & Co.* ([1908], 2 Ir. R. 483). It raises the question of the liability of mercantile inquiry agents for libellous statements published by them to a client as to the credit of a person with whom such client contemplates dealing. By a coincidence, while the case stood for judgment, a similar

question was decided by the Judicial Committee of the Privy Council (*Macintosh* v. *Dun* (L. R. [1908], A. C. 390). A very strong Committee—so strong that its judgment may practically be taken as equivalent to a judgment of the House of Lords—held that statements of this kind are not privileged. That decision was published after the Court of Appeal in Ireland had prepared their judgment, and a day or two before the judgment was delivered; it had been assumed both at the hearing of *Fitzsimons' Case*, and in the Divisional Court, that such statements *were* privileged; and the Court of Appeal, without deciding whether they were privileged or not, gave judgment against both defendants on the ground that there was malice imputable to both.

The two defendants were (1) a Company carrying on the business of mercantile inquiry agents, and (2) a local correspondent. A client of the Company, requiring information as to the credit and solvency of an intending customer of his, sent an inquiry to the Company on a printed form which they supplied, and paid the Company a fee. The Company obtained a report from their local correspondent, to whom they paid a proportion of the fee, and then the Company answered the inquiry, "in strict confidence." In the present case, the correspondent, to whom the local manager applied for information about the plaintiff, had undoubtedly malice against the plaintiff; the report which the correspondent sent to the manager was libellous; this report was fairly condensed by the manager and sent to the client. The jury found that there was a publication of the libel sued on (*i. e.*, the condensed report) both by the Company and the correspondent, and that there was malice "by the Company on the part of the correspondent but not on the part of the manager." Assuming therefore (as the Irish Courts did assume) that the occasion of the publication was privileged, the material

questions of law were obviously two: whether the malice of the correspondent was imputable to the Company, and whether the publication of the condensed report by the Company was a publication thereof by the correspondent?

The King's Bench Division answered the first of these questions in the affirmative (largely on the authority of *Pearson* v. *Dublin Corporation* (L. R. [1907], A. C. 351), and the second in the negative. The Court of Appeal answered both in the affirmative.

Inasmuch as the question of privilege has now been cleared away by the decision in *Macintosh* v. *Dun*, the present case will in future probably be most useful as an authority on the question of publication. As to that, the view which the Court of Appeal took is summarized by Fitzgibbon, L.J.: "We think that the libel was the joint product of the successive acts" of the correspondent and the manager, and that "the publication of this libel was the result of the action of the conscious intelligence of both, each acting in co-operation with the other, one supplying the information and the other publishing the purport of it, each being liable for his own acts, and the Company being liable for both."

Black v. *Scottish Temperance Life Assurance Co.* ([1908], 1 Ir. R. 541), covers some forty pages of the Reports, is concerned largely with facts, and was finally reduced to the question whether, in the circumstances, damages or a mandatory injunction was the proper remedy for an obstruction of light amounting to an actionable nuisance. *Primâ facie*, no doubt, it is a good thing to report any case in which the House of Lords reverses the Court of Appeal; otherwise it is doubtful whether this report is worth its space. The defendants, by a large red-brick building, obstructed the ancient lights of the premises in which the plaintiff manufactured ready-made clothing; the

building also altered the colour of the light passing to plaintiff's premises; it had been erected in spite of his remonstrance. Barton, J., held the building a nuisance, granted an injunction against its continuance, but put a stay on the order to allow the defendants to abate the nuisance. The defendants' attempted abatement consisted in facing with white tiles the red-brick wall which intercepted the light. The plaintiff denied that this amounted to an abatement and applied for a writ of sequestration. This was granted, the judge being of opinion that the damage to plaintiff's windows even from the white-faced wall could not be less than £500. On appeal, the Court of Appeal held that it was not a case for an injunction on the facts, but directed an inquiry as to damages. This decision was reversed by the House of Lords and the order of Barton, J., restored. Lord Loreburn laid great stress on the fact that the defendants had acted in defiance of repeated warnings. Lord Robertson thought that the Court would not have been warranted in holding "that an actionable obstruction of ancient lights could be justified by the substitution of light reflected from a white surface, when the injured owner had no legal right to the continuance of these newly-created conditions."

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Constitutional History of England. By F. W. MAITLAND, LL.D. Cambridge: The University Press. 1908.

In this work, edited by Mr. H. A. L. Fisher, are collected the notes of a course of lectures delivered a good many years ago by the late Professor Maitland on his appointment to the Readership in English law at Cambridge. Naturally they are of a quite elementary character. They embody little research, and amount only to brilliant exposition. But the exposition of elementary Constitutional law by a consummate historian like Maitland, cannot but be of the utmost interest and service. The ordinary constitutional text-book, in its anxiety to present the student with a clear-cut, intelligible account, is very apt to treat the inevitable uncertainties of this obscure subject in two dangerous ways—to slur them over, or to pronounce dogmatically upon them. Both courses bewilder the beginner. In the present work, Maitland never hesitates to say that things "seem" or "appear" to have happened in such-and-such a fashion, when that is all that can be said. In endeavouring to pierce the mists of history, this must again and again be all that one is able to say, and the lawyer is wise who resists the temptation to import legal precision into a text-book of constitutional history. The volume also embodies many valuable original ideas, and it has all the charm of a connected treatise by the really great *proseur* who wrote it. The short but masterly analysis of the idea of "Constitutional law" (p. 527, *et seq.*) has never been better done. Its criticism of Austin and Holland's definitions leaves nothing to be desired. This concluding section, and the history of the earlier periods, strike us as much superior to the account of the 18th- and 19th-century developments: and we own to a regret that Maitland did not write more in the domain of speculative jurisprudence. On the whole, that would have been a greater work for English law than the investigation of its early mediæval antiquities. It can readily be supposed that he finds history give "a standing denial of that [Austin's] theory of sovereignty, which has become orthodox in our own times." There

are some errors in points of legal detail in the latter portion of the book. For the statement that the County Court jury consists of five (p. 465), we may perhaps absolve the Editor. But it is disconcerting in a text-book for beginners, where one might at least be accurate to find that in 1857 ecclesiastical jurisdiction in testamentary and matrimonial matters was transferred to the new County Courts (p. 464). At p. 476, no hint is given that writs of error, as well as the process by way of Crown Case Reserved, have been abolished And a student who has heard nothing about any appeal from magistrate to Quarter Sessions will not know what to make of the statement that "an appeal to Quarter Sessions on questions of law can be brought before the High Court." It may be strongly doubted that there is a line left out here. The perfect mastery of Maitland over detail, and his freedom from pedantry, are nowhere better shown than in the few words in which he deals with the position of a Commissioner of Assize before and after the Act of 1873.

Select Cases concerning the Law Merchant. Vol. I. Edited for the Selden Society by CHARLES GROSS, Ph. D. London: Bernard Quaritch. 1908.

It is always a matter of great antiquarian interest to read the publications of the Selden Society. Treading paths unfrequented by the every-day lawyer, one gets glimpses of old customs, courts, and procedure that seem to bring the reader face to face with his mediæval ancestors. The present volume comprises cases tried in fair staple and tolsey courts, small local tribunals which dealt almost entirely with cases affected by the law merchant. As a rule, these courts, presided over by the mayor, bailiffs of the borough, or the steward to the local magnate, were held at the time of some fair, such as Carnarvon, St. Ives, and other places. The justice dispensed was rough and ready, but effective. At the piepowder court of Colchester held in 1485, the following speedy termination of a case is recorded. The Plaintiff sued for the recovery of a debt at 8 a.m., the Defendant was summoned to appear at 9 o'clock. He did not come at that hour, and the sergeant was ordered to distrain him to come at 10 o'clock, at which hour he made default. Similar defaults were recorded against him at 11 and 12 o'clock. At the latter session, judgment was given in favour of the Plaintiff, and appraisers were ordered to value the Defendant's goods which had been attached. They made their report at 4 o'clock, and the

goods were delivered to the Plaintiff. In these days when justice is dispensed in a more leisurely fashion, the litigant may be forgiven if he sighs for a partial return of the good old days. These courts were called "piepowder," a contraction or distortion of "pie poudres" or "pede pulverosi," from the fact the litigants were chapmen with dusty feet who wandered from fair to fair.

As usual, the learned Editor has brought to bear on his work a wealth of erudition, coupled with an infinite capacity for taking pains. Miss K. S. Martin and Miss Gladys Bradford have done much useful work, and, as usual, the volume has enjoyed the paternal help of Sir Frederick Pollock and Professor Vinogradoff.

A Code of the Law of Actionable Defamation. By G. SPENCER BOWER, K.C. London: Sweet & Maxwell. 1908.

Mr. Bower's aim is a very ambitious one, no less than a code dealing with the civil or "actionable" law of libel. It excludes criminal libel though many of such cases are cited, but includes slander. It also includes "quasi defamation," or wrongs which do not strictly amount to defamation, but "in all of which, except one, an ingredient in the cause of action is injury to personal reputation." These wrongs are (1) Dishonouring by a Banker of Customer's Cheque; (2) Defamation causing damage to a person other than the party defamed; (3) Malicious Publication of False Non-Defamatory Matter causing Actual Damage; (4) False and Malicious Disparagement of Property causing Actual Damage; (5) False Statements in relation to the Character of a Candidate at a Parliamentary Election. The Code consists of 64 Articles. There is "running commentary" of footnotes giving and discussing "the living authorities" on which the Articles are founded; and nearly half the volume is taken up by 21 appendices. One feature of the Code worth noticing is the amount of space devoted to the rules as to allegation and burden of proof, questions of law and fact. The law as to Newspaper Libels is treated separately, and the Author does not show much sympathy for "the class of people who trade in news." The appendices are full of interesting discussions and comments, illustrated with many literary references, such as the striking example of libel by insinuation from Othello. There will also be found a strong dissent from the decision in *Wennhak* v. *Morgan*. Mr. Bower most properly attaches great importance to the exactness of language in a code, and employs

to a certain extent a terminology of his own which he justifies at some length. He also adopts a valuable uniformity in employing the words "libel" and "slander," consistently to indicate the act of publication and not the thing published. This last is termed "libellous matter" or "slanderous matter." The Code shows throughout great care, acuteness and labour, and the notes legal learning, literary knowledge, and analytical power.

Small Holdings and Allotments. By G. A. JOHNSTON, M.A., J.P. London: Effingham Wilson. 1908.

The law of small holdings and allotments has now become a most important branch of our land legislation. As nearly all the statutes on this subject refer to one another, and are to be read together, the lay mind becomes confused, and the busy lawyer has his labours enormously increased. To obviate all this Mr. Johnston has striven to place together the different sections in different Acts bearing upon the same point. Of course this entails the reader jumping about from one part of the book to the other, but the scheme certainly makes for simplicity, The Introduction is divided into two Parts. Part I deals with Small Holdings, pointing out how various bodies and individuals are affected; Part II embodies the same ideas so far as affect Allotments. Then the various statutes are collected which deal with the subject as a whole, and finally we have presented to the reader various Rules and Official Circulars issued by the Board of Agriculture. The book shows considerable originality, research and careful compilation, and should be of great practical utility to councils—borough, urban district and parish—also to landowners, tenant farmers and other persons whose respective interests are regulated by this branch of legislation. The Index is comprehensive, the Table of Cases and List of Statutes exhaustive. Speaking generally the work appears to appeal to a marked extent to readers both lay and legal.

The Roman Law of Slavery. By W. W. BUCKLAND. Cambridge: The University Press. 1908.

This appears to be the first systematic legal treatment of the subject in England, except the smaller works of Blair and Bishop Brownlow, which are economical as well as legal. Everything that can be said has been said, and well said. Although one may not in every point agree with Mr. Buckland's conclusions, there is no

doubt that he has worked out every point by independent thought, and this sometimes leads to difference from the standard authorities on Roman law in general. The work, which is voluminous, treats most of the relevant texts of the *Corpus Juris*, with occasional references to English law, though, of course, not a word of it is or was good English law. The English race, at least in England, have missed the feeling of satisfaction, no doubt felt by the Romans, in taking their breakfast kidneys from the hands of a Plautus or in watching Epictetus grilling a chop. The curious point in *Gaius* iii, 146 as to hire or sale of gladiators, does not seem to be noticed, nor does that in iii, 96 as to the oath exacted from a freedman. Something might have been said with regard to the enlistment of slaves for military service under the later Empire, when every man was of importance, free or not. The old *dignitas* of the soldier (*Cod.*, xii, 34, 7), disappeared in the stress of events. The book is a credit to English research and may safely be consulted on any point which it touches.

The Annual County Courts Practice, 1909. 2 Vols. By His Honour Judge SMYLY, K.C., and W. J. BROOKS, M.A. London: Sweet & Maxwell. 1908.

Although for the last few years the Civil Statistics have shown a continuous falling off in the number of County Court Cases, there is still a vast amount of business transacted, and cases of increased importance are now taken in consequence of the recent legislation which most years add to the burdens of County Court Judges. The Editors hoped to be able to add a new County Court Act in this edition, but their hopes have been disappointed. The present edition retains its familiar features, and although the new rules have now come into force, there are no very important alterations to notice. The addition to Ord. XXVI, r. 16, which was necessitated by *Llewellyn* v. *Rowland*, will probably be useful to judgment creditors. Another recent case concerns an important branch of County Court Practice, and enables a plaintiff to add an alternative claim under the Employers' Liability Act 1880 in an action of negligence remitted from the High Court. We are told that business under the Workmen's Compensation Act 1906 is increasing with great rapidity, and considerable attention is paid to that subject, and all the recent cases are referred to, including the somewhat curious decision of the House of Lords

in *Ismay, Imrie & Co.* v. *Williamson.* The only important new Statute included is the Agricultural Holdings Act 1908, which does not practically affect the jurisdiction of the County Courts. The practitioner can still resort to the work with confidence that all that care and labour can do to aid him has been done.

The Annual Practice, 1909. 2 Vols. By T. SNOW, M.A., C. BURNEY, and F. A. STRINGER. London: Sweet & Maxwell.

The Yearly Practice of the Supreme Court for 1909. 2 Vols. By M. MUIR MACKENZIE, T. WILLES CHITTY, S. G. LUSHINGTON, M.A., B.C.L., J. C. FOX, and R. E. ROSS, LL.B. London: Butterworth & Co.

The A.B.C. Guide to Practice, 1909. By F. A. STRINGER. London: Sweet & Maxwell.

One or other of these works every practitioner must have, and in making his selection he will probably choose the one whose arrangement he is most used to. Both Practices, if we mistake not, are rather more substantial than in former years; in fact, to our mind, the larger volumes are so bulky as to be unpleasant to handle. The Editors have had some important additions to make. The Rules of March 1908 considerably increase the jurisdiction of the Masters of the King's Bench Division and of the Registrars of the Probate, Divorce and Admiralty Division. Order 53a, June 1908, is an important Order regulating the procedure in actions for infringements of Patents and under the Patents and Designs Act 1907. Careful notes have been appended to these rules in each of the works under notice, those in the *Annual Practice* having been prepared by Mr. Courtney Terrell, and those in the *Yearly Practice* by Mr. W. E. Bousfield. A very material change in practice at Chambers is made by the rules of July 1908; in the opinion of the Editors of the *Annual Practice* the "new system may result in the abolition of Judges' Chambers." The Short Causes Rules (Admiralty Division, 1908) were very recently issued, but are of great importance, as they may possibly, as pointed out in the *Yearly Practice*, prove a speedy and economical mode of trying Commercial Cases. Considerable attention has been paid in both these works to the law regarding Solicitors, sections of the principal Acts referring to them being given, and Mr. E. Todd has contributed a useful note on Solicitors' Costs and Lien to the *Yearly Practice*. What still remains peculiar to the *Annual Practice* is the valuable collection of the resolutions of the General Council of the Bar upon Professional Etiquette; the Tables

giving the new Schedule for Circuit dates appointed by the Order in Council of March 1908, and two elaborate Tables giving precise details of the work assigned to every Judge of the King's Bench Division during the year's Court work. We also notice this year the inclusion of the British Law Ascertainment Act 1859. The names of the Editors are sufficient to vouch for the care and accuracy of the revision and addition of cases. The re-arrangement of the Judicature Acts in the *Yearly Practice* is in our opinion an improvement.

Mr. Stringer's *A.B.C. Guide to Practice* is as usual a concise and useful abstract of the Practice, with numerous references to *The Annual Practice*, where more information on a subject may be required.

Encyclopædia of Forms and Precedents. Vols. XII—XVI. Edited by A. UNDERHILL, M.A., LL.D. London: Butterworth & Co. 1907–8.

We sincerely congratulate Mr. Underhill and those gentlemen associated with him in editing and drafting the notes and forms in these volumes, in having so nearly arrived at the conclusion of their labours. As Vol. XVI is concerned with "Notanda and Supplementary Forms," we conclude that the only volume that remains to be issued is the Index volume, which we are told will take up some 700 pages. We must also congratulate the publishers in having produced so valuable a work in so handsome a form. Mr. Underhill has been assisted by the following gentlemen, who acted as sub-Editors. For Vols. XII and XIII, Messrs. H. B. Bompas, M.A., and H. H. King, LL.B.; for Vol. XIV, Messrs. F. G. Underhay, M.A., and W. M. Crowdy are added; for Vol. XV, Mr. King and Mr. H. F. F. Greenland are associated; and in the sixteenth volume Mr. W. F. Webster has joined the last two gentlemen. A very large number of gentlemen has contributed to the notes and forms, and we shall mention some of them when noticing the contents of each volume.

Vol. XII is a very bulky one, in fact, we think it is the largest of the whole series, but it is not too large for the important subject to which it is entirely given, namely, the Sale of Land. Ninety pages are occupied with Tables of Contents, Cases and Statutes, and the text takes up 980 pages more. The preliminary note of 148 pages is contributed by Mr. H. King, and is excellent both

in arrangement and matter, and is followed by 309 Precedents, commencing with 38 agreements for sale and concluding with 16 Mixed Assurances. Footnotes indicate the correct stamps on all the documents that require them. The majority have been settled by Messrs. J. H. Redman, H. Freeman, E. Riviere, G. M. Kindersley, H. F. F. Greenland and F. E. Colt. They cover a wide range and seem very carefully drawn, and include such rather unusual conveyances as one of freeholds belonging to a convicted felon, and one of lands of qualified Freehold tenures.

Vol. XIII covers Service Contracts—Settlements, and only contains those two subjects. The preliminary note on the former is by Mr. H. Freeman, who with Mr. W. A. Russell and Mr. C. A. Hunt, settles the Precedents. The latter cover a great variety of services, some of them not easy to think of. Among the Contracts of Personal Service are one between a cricket club and a professional cricketer for Colonial tour, and one with a professional golfer to lay out a golf course abroad. Some forms of contracts for services of animals for breeding purposes are worth noticing. The remainder of the volume is taken up with the difficult subject of Settlement. This, with the exception of a few forms, has been entrusted to the very competent hands of Mr. J. S. Vaizey. The preliminary note covers 120 pages. The precedents are under five headings which are Realty Settlements, Personalty Settlements, Voluntary and Post-nuptial Settlements, Miscellaneous Clauses, and Ancillary Documents.

Vol. XIV, Shipping Documents—Tramways. Contains several titles, the most important of which is probably Shipping Documents, contributed by Messrs. A. Pritchard and H. S. Moore. There is a short but instructive note, with 17 precedents, on Stock Exchange Documents, by Messrs. L. Mossop and M. N. Drucquer; and other subjects of importance of rather a special nature are—Theatres, treated by Messrs. H. S. Preston and P. Shee; Trade Combines, by Mr. E. Wooll; Trades Unions, Association of Employers and Boards of Conciliation and Arbitration, by Mr. H. B. N. Mothersole. There are also 20 precedents connected with Tramways, for all of which, except two, Mr. J. W. Greig is responsible.

The fifteenth volume has only three headings. Of these, Trusts and Trustees is by the Editor and Mr. C. A. Bennett The forms relating to the Public Trustee, a new and interesting departure, are by Mr. H. F. Greenland, and there are some occasional forms by

other gentlemen. There are 47 precedents, of which 17 relate to the Public Trustee. An important and useful heading is that of Water, Gas, and Electricity. The forms relating to Water have been, with one exception, settled by Messrs. Baines and Greig, and with a similar exception those relating to Gas and Electricity have been settled by Mr. Greig. These forms struck us as being likely to be in considerable request. The last Title in the volume is Wills, and it could have been entrusted to no better hands than those of Mr. H. S. Theobald, K.C., with whom are associated Messrs. J. C. B. Dyne, Jun., and H. Church. The precedents begin very aptly with a form of 32 questions to be put to the intending testator. Such questions are much to be recommended. There are 254 precedents, most of which are included in the Leading Miscellaneous Clauses. Some of these are worth noting, such as the expression of a wish to be cremated, and a provision to guard against being buried alive. The investment clauses seem to us stricter than those that are now usually inserted.

Vol. XVI consists of notanda, ranging over all the previous volumes, with occasionally supplemental precedents. Some of the most important of them are perhaps those on Allotments, Small Holdings, and Small Dwellings. In view of the recent legislation, the 25 precedents contributed by Mr. S. Clarke are well worth notice. The law of Companies has, since the publication of Vols. IV and V, been materially altered by the Act of 1907, and this renders Mr. Webster's Notes and Precedents of considerable importance. A new Preliminary Note and Supplemental Precedents have been contributed by Mr. Webster, in consequence of the Patents and Designs Act 1907 and the Designs Rules 1908. The recent Public Health Acts Amendment Act 1907 is the cause of the Public Health and Public Safety note and precedents by Mr. J. W. Baines; and Mr. G. E. Jones, after waiting in vain for the statute law on the subject of Schools to be "put upon a more satisfactory footing," has had to include his postponed heading in the present volume.

A Concise Treatise on the Law relating to Executors and Administrators. By A. R. INGPEN, K.C. London: Stevens & Sons. 1908.

If Mr. Ingpen required any guarantee of his knowledge of the law of Executors and Administrators, it would be sufficient to point out that he was one of the Editors of the last edition of Lord Justice Vaughan William's great work. The present volume is an attempt

"to express in a concise form the general principles of the law relating to executors and administrators." It seems to be to a great extent based on and intended "as an introduction to the greater work." The arrangement is to a considerable extent different, and much new matter is introduced. By availing himself of the opportunity of making constant references to the larger work, the Author has been able to deal more concisely with many subjects and cite fewer authorities than might perhaps have been otherwise necessary. It is intended for the use of both the student and practitioner, and has therefore to guard against too great elaboration and too bald statement. Between this Scylla and Charybdis Mr. Ingpen has steered successfully, and has given us a treatise sufficient for most practical purposes in a comparatively moderate-sized volume. We have found any points on which we have sought information most adequately treated, and as a good sample of Mr. Ingpen's method we may refer our readers to the excellent chapter on Death Duties. The statement, correctly given, as to the general legacies not bearing interest until a year after the death of the testator, reminds one that testators perhaps do not often bear in mind the inducement that this rule may sometimes hold out to an executor who is also residuary legatee to delay winding up an estate as long as he can in order that accruing interest may swell the residue of the estate.

Encyclopædia of Local Government Law. Vols. IV—VII. Edited by J. SCHOLEFIELD. London: Butterworth & Co. 1907–8.

These four volumes complete this important work, and we are glad to be able to congratulate Mr. Scholefield on the successful termination of his labours in editing a work which is of real value to all who desire to obtain information as to the numerous rights and duties connected with Local Government. We propose shortly to call attention to a few of the most important contributions to these volumes. Volume IV—Hundreds to Nuisance—is rather a larger volume than the average one, containing 700 pages of text. The article of greatest importance is probably that on Nuisances, by Mr. W. Addington Willis and W. V. Ball. Its scope is, of course, limited, as it is intended to deal only with "such nuisances as are caused by local authorities in the execution of their statutory duties and powers, and with such nuisances as are of a public character, or for the punishment or suppression of which local

authorities may take proceedings." Part of the subject has also been previously dealt with under the articles "Actions by and against Local Authorities," and "Highways." In spite of these considerations and a commendable conciseness on the part of the Authors the article extends to about 120 pages. Another important article is that on Lunacy, by Mr. S. G. Lushington and Mr. F. J. Coltman. That on Loans, by Mr. W. Jevons, is prefaced by an interesting statement of the amount of "Loans now outstanding, their Amount, Purpose, and Growth." Mr. Jevons gives the amount of loans outstanding for 1903-4 as £393,882,146, an amount which rather more than quadruples that of 1874-5. Mr. Jevons, we are bound to say, qualifies the gravity of this enormous debt by pointing out what provisions are being made for its repayment, what amount of principal has been repaid, and what proportion is for so-called reproductive undertakings. Another article of general interest deals with Locomotives and Motor laws. Mr. Davey has dealt with both these subjects, though perhaps some people may think that Motor Cars should be included in the article on Nuisance. In Volume V—Officers of Local Authorities to Rates and Rating—the principal article is one by Mr. E. M. Konstam on Rates and Rating. Mr. Konstam states his object to be "to give a compendious, and at the same time fairly detailed, account of the various rates, with the statutory authority under which they are levied and the method by which they are assessed." This he has done very successfully in about 150 pages. The next longest article is that on "Private Streets, Paving, Sewering, etc., and Adoption of," contributed by the Editor and Mr. G. R. Hill. Although the difficult question of incidence of charges for these purposes does not concern the local authorities, some cases are cited "for the benefit of the general reader." Mr. G. R. Hill and Mr. H. J. Comyns are each responsible for several of the shorter articles; the former contributes those on "Persons, Cleansing of, Act 1897," "Petroleum and Carbide of Calcium," "Plague, Cholera and Yellow Fever," "Pumps, Cisterns and Wells": and the latter contributes "Overseers and Assistant Overseers," "Parish Councils," "Parish Meetings," "Parish Property" and "Postal and Telegraphic Facilities." Volume VI—Reformatory and Industrial Schools to Vestry Clerks—contains no less than 25 articles. Of these we would direct attention to the one on Schools by Mr. W. V. Ball, which deals with the administration of our educational system as far as it concerns local authorities,

excluding those of the County of London. We think Mr. Ball may have felt considerable misgivings as to the permanent value of his work considering the uncertain educational future. Other important articles are on the unsavoury subject of "Sewers, Drains, and Sewage Disposal," by Mr. W. Addington Willis; "Tramways," a subject of increasing importance, by Mr. G. S. Robinson; "Reformatory and Industrial Schools," by Mr. T. E. Bettany and Mr. A. Locke Mr. S. W. Clarke contributes no less than eight of the shorter articles. The most important parts of Volume VII, which concludes the work, are the Notanda and the Index. The former is the work of Mr. S. W. Clarke, and the latter of Mr. W. J. Allen and Mr. F. L. Ogden. This last very important part of the work fills up no less than 409 pages, and seems to be very carefully done. It is obvious how very much a good Index adds to the value of any work, particularly one of great length in several volumes. We should like, in concluding our notice, to call attention to the graceful Preface in this volume, in which the Editor expresses to the Subscribers his regret for the delay in the completion of this work, and his thanks to Mr. G. R. Hill, whose knowledge of Local Government law he states to be "wide and exact," for his assistance in editing the two last volumes.

Encyclopædia of Local Government Board Requirements and Practice. 2 Vols. By A. E. WOOD and T. R. JOHNSON. London: Butterworth & Co. 1908.

Local Government is becoming the spoiled child of legal literature. Books innumerable have been published on various branches of law connected with it, and an elaborate and valuable Encyclopædia of Local Government law has just been completed. The present work is not intended as a legal text-book, but as a practical guide to all who have to deal with the Local Government Board. These, besides Solicitors, will include Officials of Local Authorities, Engineers, Parliamentary Agents, Land Agents, and many others. Each of the numerous subjects dealt with forms a separate part arranged in alphabetical order. These parts number 69, and range in importance from Education and Housing of the Working Classes to Public Clocks. A summary of the law relating to each subject is given at the commencement of each part, and there is also a reference in each part to a text-book. Great familiarity is shown with the Orders, Reports, and practice of the

Local Government Board, and the advice as to its views and methods is of the greatest practical value.

The Laws of War on Land. By T. E. HOLLAND, K.C. Oxford: The Clarendon Press. 1908.

There is by this time a bewildering variety of conventions bearing on the conduct of warfare. They overlap one another, and repeat themselves in a very confused fashion. It is not easy to disentangle their provisions, and it is tedious work. It is therefore a great thing to have their clauses set out in the form of a consecutive code, and the reduction to orderly arrangement of a confused mass of such material is peculiarly the province of Professor Holland. It may well be believed that the book took much longer to prepare than its bulk would indicate. By its aid, even the unskilled reader can now easily understand what the various conventions have accomplished. It may be that he will conclude that they have not accomplished very much. For the loop-holes which they leave to commanders, particularly as they are interpreted by Dr. Holland, are so many and so wide, that the practical conclusion is that an officer may do what he likes, provided he does it to further the objects of the war, and not out of pure wantonness. The Author even questions whether a soldier who surrenders and disarms may not be refused quarter. War is a rough game: but the theory that the more savagely you wage it, the more humane you really are, is more than questionable. We cannot help considering Dr. Westlake's treatise, with its clear disclaimer of the German theory of *kriegsraison*, a safer guide for the officer on active service. That does not lessen the value of Professor Holland's book to the student, who will be grateful for a path through a very tangled forest.

Pacific Blockade. By A. E. HOGAN, LL.D., B.A. Oxford: The Clarendon Press. 1908.

Dr. Hogan defends, in its least defensible aspect (as extending to the ships of third parties), that form of unlawful violence known as pacific blockade; but his arguments are not convincing, and he himself characterises them in one instance as "somewhat sophistical." He infers, for example, that because reprisals are permissible, no limit can be set to them; which is in flat contradiction to Vattel's standard definition of the term. In his second part, the Author sets out valuable details of several "pacific" blockades. A reference to Atherley-Jones' *Commerce in War* would have supplied him

with one or two more. The list is swollen by the inclusion of cases of violent hostilities, of "blockade" of disturbed parts of the blockaders' coast, and of cases of mere reprisals. (The Brazilian case of 1858 was, for instance, nothing more nor less than an example of the good old custom of reprisals according to Vattel.)

It is impossible to create out of a few anomalous incidents a new legal institution. A gauge of the extent to which the upholders of "pacific" blockade are deluded by words is found in a casual remark of the Author, in which he exclaims at the "curious" idea of Geffcken, that the Greek proceedings of 1886 were "not a blockade." The really curious notion is that which considers a port blockaded to which commerce has constant access. In fine, the Author would spring on the world a novelty which he admits cannot be governed by any established rules, and which he comes near to emancipating from all rules whatever. The temperate style in which he writes deserves high praise; as does also the thoroughness and method with which he has collected information. The learned Registrar of the Admiralty Court appears as "Roseve" on p. 48, and another Author as "Attlay." Otherwise there are few misprints. The book, though short, would have been none the worse if an index had been included. Considering the absence of material in English dealing with this subject, it might have been well for the Author to have included in his bibliography the article which appeared in this Magazine for August 1896. He would possibly not then have quoted Cauchy as an authority in favour of the compatibility of blockade with peace.

Second Edition. *Conflict of Laws.* By A. V. DICEY, K.C., Hon. D.C.L. London: Stevens & Sons. 1908.

To the international lawyer, the manner in which the laws of different lands conflict is an endless source of puzzle. If it were possible to agree a common basis upon which to legislate in certain matters, how it would limit the annual output of judicial decision. If, for instance, civilised nations agreed upon a law of divorce, domicil, or contract, common to all of them. But such an ideal is impossible, until we have some equivalent to "Esperanto" in law. The fact that this conflict exists has necessitated an understanding among civilised nations that the decision of each should be recognised in others. Unless this were so, think how impossible the situation would be if the English Courts refused to recognise an American divorce. Take also, for example, the British Empire, comprising as

it does, a variety of systems of law: what confusion would ensue if in the most important matters the Courts of the several Colonies did not recognise each other's decisions. Such matters as Divorce, Domicil, Bankruptcy, Contract, and other subjects of equal importance, are dealt with in a scholarly and able manner in Professor Dicey's book. Following his usual custom, the learned Author places in the Appendix valuable notes germane to the subject-matter of the text. It is now some twelve years since the first edition was published, and the present one is intended to bring the work quite up to date, besides embodying in the text the result of the many decisions which have accumulated during that period. Professor Dicey has omitted the notes of American cases which had been provided in the first edition by Professor J. B. Moore. Once more, we are glad to say, the Right Hon. Arthur Cohen, to whom the book is dedicated, has rendered aid to the learned Author in its preparation. How valuable that aid must have been can only be appreciated by those who know Mr. Cohen to be an erudite jurisconsult. In conclusion, we can only say that, for merit and instructiveness, Professor Dicey's book has everything to commend it.

Second Edition. *Macdonell's Law of Master and Servant.* By E. A. Mitchell Innes, K.C., M.A. London: Stevens & Sons. 1908.

The first edition of this important work was published in 1883, and was compiled by Sir John Macdonell. The present edition is divided into two parts, Part I dealing with the Common law on the subject, and Part II with the Statute law. Since the production of the first edition much has eventuated by means of legislation and judicial decision. Take, for instance, legislation; the whole fabric of the law has been revolutionised. Formerly, the Civil law of conspiracy applied to trade disputes, a question which was placed beyond dispute by the House of Lords in *Quinn* v. *Leathem* (L. R. [1901], A. C. 495). In the year 1906 the Trades Disputes Act was passed which exempted acts done in contemplation or furtherance of a "trade dispute" from the application of that principle. This would have been sufficiently sweeping; but the Act went further, and over-ruled the famous *Taff Vale Case* by prohibiting actions of tort against Trade Unions. All these points are thoroughly elucidated and dealt with in masterly fashion. At he risk of making the work unwieldly, Mr. Mitchell Innes has

considered the needs of the lawyer without ready access to a law library, and has printed all the rules, forms and orders drawn up under the various Employers Liability and Workmen's Compensation Acts. The Index is complete and illuminating of the text. Speaking generally, the present edition may well be regarded as a standard work on the law of Master and Servant.

Second Edition. *Cardinal Rules of Legal Interpretation.* By EDWARD BEAL, B.A. London: Stevens & Sons. 1908.

It is some twelve years since the first edition of this useful work appeared, so that a second, bringing the matter absolutely up to date, will be very welcome. Further materials, too, have been collected, which, together with other alterations and additions, have increased the size of the volume. The book itself is divided into eight parts. In Part I we have the wide subject of Case law discussed in a way which shows the relative value attached by judges to the utility of various reports; Part II gives the Rules of legal interpretation applicable to all instruments; Part III treats of contracts; and Part IV shows us the Rules applied to the interpretation of all deeds. In Part V mercantile instruments find a place; and miscellaneous instruments come in Part VI. The interpretation of Statutes is the subject-matter of Part VII, and when one realises that treatises have been written dealing exclusively with this branch of law, one views with a somewhat critical eye the learned Author's treatment thereof. One is bound to say that the way he deals with this is masterly and complete; apparently nothing is missed, and the text is a mine of useful information. The heading of "Wills," which concludes these divisions in Part VIII, is also of paramount importance, and here again Mr. Beal maintains a high standard. The scheme of the Index is a model which might well be followed by others. The great value of this work in Colonial Courts, where text-books and reports are not always available, and where questions affected by the Rules of Interpretation are always cropping up, can readily be estimated.

Third Edition. *May on Fraudulent and Voluntary Dispositions of Property.* By W. DOUGLAS EDWARDS, LL.B. London: Stevens & Haynes. 1908.

The first edition of this treatise was compiled in 1871 by the late Mr. May. At that time it was apparently the only exhaustive work which had appeared on the subject since the commencement of the

century. Since the appearance of the second edition many points have been decided on the statute 13 Elizabeth, c. 5, more especially regarding the impeachment of voluntary conveyances by subsequent creditors. The Voluntary Conveyances Act 1893 restricted to a very large degree the operation of the statute 27 Elizabeth, c. 4, on voluntary conveyances, making much of the Case law on the latter statute obsolete. In the present edition the provisions of the Bankruptcy law bearing on the subject of the book have been grouped under one head, in place of being scattered about in various chapters. In conclusion, it may be stated that many of the chapters have been re-written, the matter brought thoroughly up to date, and the book in every way qualified to occupy a foremost position in any lawyer's library.

Third Edition. *The Law of Trade Marks and Trade Name.* By D. M. KERLY, M.A., LL.B., and F. G. UNDERHAY, M.A. London: Sweet & Maxwell. 1908.

In reviewing a new edition of a standard work, there is not much to be said beyond pointing out some of the novelties comprised in it. Mr. Kerly's book reached its second edition in 1901. Since that date the Trade Marks Act 1905 has been passed and has brought about many reforms. The objects of this Act were many, but the following were important:—(1) To divorce once and for all the subject of Trade Marks from that of Patents and Designs, an alliance attended with dire results since 1883; (2) to enlarge the scope of the Register by admitting many new classes of marks; (3) to simplify the law of registration. When incorporating this new Act, it was found necessary to re-write a great part of the earlier chapters, which has been done. The learned Authors appear to deplore the tendency of modern decisions to sweep away all technical discussion as to what can or cannot be acquired as a Common law trade mark, and make it simply a question of whether the defendant has or has not tried to pass off his goods as the plaintiff's. Some may agree with these strictures, some may not, "*quot homines tot sententiæ.*" The Appendix contains some important Trade Mark Acts passed by the United States and the Commonwealth of Australia. Other reforms have been introduced which will no doubt commend the present edition to the wide circle of readers of the former ones.

Fourth Edition. *Acts relating to the Estate Duty.* By Sir EVELYN FREETH, assisted by C. R. ELLIOTT. London: Stevens & Sons. 1908.

The fourth edition of this popular work has been very carefully revised, and includes the Finance Act 1907. The Authors are both qualified by reason of their experience to be considered as authorities on this very intricate and technical subject. Sir Evelyn Freeth holds the post of Secretary of the Estate Duty Office, and Mr. Elliot occupies a position in the same office. In the first instance, we are given an epitome of the Finance Acts, wherein the different subjects are grouped under their respective heads. Part II deals with the Finance Acts of 1894, 1896, 1898, 1900 and 1907, together with notes which contain much valuable information. The Appendix of Forms seems to be comprehensive and complete; some of these forms do not come before the public except on rare occasions, when special application is made for them. The book may be safely recommended to those in search of correct and complete information with respect to the estate and other death duties.

Fifth Edition. *Laws of Insurance.* By J. B. PORTER, assisted by W. F. CRAIES, M.A. London: Stevens & Haynes. 1908.

Mr. Porter first published this work in 1884 and to each edition he has added references to fresh cases till now they number nearly 1,900. The last edition was published as recently as 1904. The learning and care bestowed on the work is well known, and there are only two features we purpose to call special attention to. The first is, that it contains the whole law of Insurance, with the exception of Marine, namely, Fire, Life, Accident and Guarantee, in one volume of moderate size of (including the Index) 594 pages. The other is the very large number of American decisions cited. Authors differ in the methods of treating American decisions, and their value depends to some extent on the branch of law treated, but there is no doubt that the law of Insurance, for some reason or other which we will not stop to inquire, has been the subject of very great litigation in America, and these decisions should prove of considerable use in furnishing advocates with arguments, to put it no higher. A list of abbreviations by which the American and Colonial reports are referred to renders reference to them easy.

Sixth Edition. *Oliphant's Law of Horses.* By C. E. LLOYD, T. C. BARTON, M.R.C.V.S., and C. MORSE, D.C.L. London: Sweet & Maxwell. 1908.

The first edition of this treatise appeared as far back as 1847 and was produced by the late Mr. Oliphant. It was a work which dealt with all the law affecting the horse directly and indirectly. It included a Part III, which dealt with Racing, Wagers and Gaming. Very wisely this branch of the subject has been omitted from the present edition, owing to the fact that this matter, having grown to such enormous proportions, more suitably would be dealt with in a separate treatise. Mr. Barton is responsible for those parts of the book which deal with the veterinary aspect of the subject, and Mr. Morse has annotated the text with Canadian cases. Mr. Lloyd, then, is really the Author of the major portion of the book, and well he has acquitted himself of the task. The buying, selling and exchange of the "Friend of Man" have been most adequately dealt with. Such vital subjects as Unsoundness, Warranty, and Fraudulent Contracts, have been treated of in a masterly fashion. In Part II we find the wide subject of Negligence in the Use of Horses explained in a clear and succinct manner. The appendices contain not only the English but the Canadian statutes on the subject. If one might criticise, it would be to say that the Index is somewhat cumbrous and calls for revision. Taking it all round, however, the book is a fund of case and general law affecting the Horse and his use.

Seventh Edition. *The Public Health Acts.* Vol. I, by A. MACMORRAN, K.C., and J. SCHOLEFIELD; Vol. II, by A. MACMORRAN, K.C., and S. G. LUSHINGTON. London: Butterworth & Co. 1908.

Lumley's Public Health is a book of world-wide fame, and finds a place on every lawyer's book-shelf. Public Health is a vast subject, and many writers have issued works dealing with it in a more or less satisfactory manner, and yet *Lumley* keeps its place as *the* standard treatise. Every year Parliament passes laws which in a direct or indirect manner add to the complexity surrounding this branch of legal study. In fact, a lawyer has to assimilate so much knowledge that it requires almost a lifelong study to be anything like proficient in it. Of this select band of experts, none holds a higher position than Mr. Macmorran, and no more able hand could be chosen to bring the present work up to date. Of course we

know that he has been associated with several previous editions, but when one realises the tremendous amount of additions since the last, one wonders how such a busy man finds time to successfully cope with so enormous a duty. The Public Health Acts Amendment Act 1907 in itself would necessitate a fresh edition. That Act offered facilities to sanitary authorities outside London for acquiring various additional powers under certain local Acts without entailing the expense of going to Parliament to obtain them. The Act (7 Edw. VII, c. 53) contains 95 sections which are grouped under ten heads. Part I is general; Part II deals with streets and buildings; Part III contains sanitary provisions; Part IV provides for infectious diseases; Part V regulates common lodging-houses; Part VI, recreation grounds; Part VII, Police; Part VIII, Fire brigade; Part IX, sky signs, and Part X deals under the head of "Miscellaneous" with such multifarious matters as bathing places, life-saving appliances, the licensing of pleasure boats, etc. From this *resumé* it is obvious how various and far-reaching this Act is in effect, and how ardous must be the work of annotating the different sections. In addition to this Act, we find other new Acts which affect Local Bodies, as the Cremation Act 1902; the Borough Funds Act 1903; the Local Government (Trahsfer of Powers) Act 1903; and very many others dealing with almost every branch of local government. All of these various statutes have been collected and annotated with the greatest possible care. Many of the notes in previous editions have been re-written. This affects, particularly, many of the annotations to various sections of the Public Health Act 1875, that Magna Charta of public health. One section, namely, 104, has had its notes considerably added to by the inclusion of the discussion relating to the position between landlords and tenants in connection with drainage and paving expenses, and the many decisions thereon. Volume I contains all the Public Health Acts properly so called, from 1875 down to the last one in 1907. Volume II contains the Appendices. Appendix I is composed of various Acts not strictly Public Health Acts, but which are germane to the subject. Appendix II deals with Accounts and Audit, a most important subject to local bodies which now-a-days handle such enormous sums of the taxpayers' money: also many other matters such as Allotments, Alteration of Areas, Bills in Parliament, Cemeteries, etc., which form such a constituent part in local management. In the preparation of

Volume I, Mr. Macmorran has had the valuable assistance of Mr. Joshua Scholefield, and in the preparation of Volume II, his assistant has been Mr. S. G. Lushington, who is well known, not only as an authority on Public Health, but as being himself also the author of many widely-read law books. The Index, which is clear and illuminating of the text, must have necessitated considerable labour in its preparation and compilation. The Tables of Statutes and Cases are excellent. In conclusion, one may be forgiven for hoping that Mr. Macmorran may be able to superintend many future editions, and that he will always find to hand such able lieutenants as Messrs. Scholefield and Lushington. On the general merits of this treatise all has been said in its praise before that can possibly be said, and we feel certain that in the future as in the past, the library of no clerk to any local body will be complete without it.

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Seventh Edition. *Introduction to the Study of the Law of the Constitution.* By A. V. DICEY, K.C., Hon. D.C.L. London: Macmillan & Co. 1908.

Professor Dicey's work, which was originally intended to fit the student for an intelligent study of Blackstone's *Commentaries*, is too well known to call for much comment. The present edition is to all intents and purposes a reprint of the sixth. One important exception, however, calls for notice, that being the revision of Chapter XII, on *Droit Administratif.* Three reasons are given for this revision: (a) A wish to meet criticism on the description of a branch of French law, first brought to the notice of the English reading public by Professor Dicey himself; (b) A wish to insert in the text two long Notes on this subject formerly to be found in the Appendix; (c) A wish to show that the fundamental differences existing between the French and English systems is day by day diminishing, by reason of the enlightenment of French jurists. In this connection the learned Author avows the debt of gratitude he owes to Professor Jéze for his valuable suggestions. In the Introduction, the learned Author deals with the true nature of Constitutional law, in the course of which he speaks of the great services rendered by Bagehot, the political theorist, in elucidating the intricate workings of English Government. Part I gives an account of the Sovereignty of Parliament, and when speaking of the policy of Imperial government not to interfere with the action of Colonial Parliaments, the learned Author gives the striking instance of the Immigrant's Restriction Act

1907, No. 15, passed by the Transvaal Legislature. In commenting on this Act, the Secretary of State for the Colonies condemns in strong phrases the terms and effect of this Act from the English point of view, and yet, acting on the principle that a Colony knows what legislation best suits its local requirements, he gave it his official sanction. It is surprising to see a writer of Professor Dicey's accuracy assign to Mr. Morley the post of Secretary of State for the Colonies, a position he certainly did not hold in 1907, and, as far as we know, has never held in his life. In Part II he treats of the Rule of Law and its omnipotence in the political institutions of England, and throughout this part of the work we learn its nature and general applications. Chapter XII most ably deals with a comparison between the English Rule of Law and the French *Droit Administratif*, and presents in a most striking manner the Continental point of view as compared with ours. Part III gives us the connection between the Law of the Constitution and the Conventions of the Constitution. One of the most remarkable things in studying our system of government is the *recognised* code of unwritten Conventions. Without possessing the formal authority of the Statute law, at the same time history and usage has given it a binding force of equal strength. In the Appendix are gathered together notes upon the twelve constitutions framed by French constitution-makers since the meeting of the States-General in 1789, the division of powers in Federal States, the distinction between a Parliamentary executive and a non-parliamentary executive, the right of self-defence, questions connected with the right of public meeting, and many other subjects of intense interest to the reader. Originally, this work was made up of actually delivered lectures to students, but by means of revision and alteration it has become the recognised standard work for those on the threshold of their study of Constitutional law.

Poor Law Settlement and Removal. By H. DAVEY. London: Stevens & Sons. 1908.—Poor Law Settlement is not as prolific of litigation, and as good a friend to the lawyers, as it used to be, but there have been two very important decisions in the House of Lords lately, which probably had much to do with the production of this book. These are *Fulham Union* v. *Woolwich Union*, and *West Ham Union* v. *Edmonton*. The former over-ruled *Tipton's Case*, and the other cases which follow it, in spite of these cases having been followed for many years. In that case, although the judgment

of the Court of Appeal was reversed, it was merely formal, as that Court decided as they did because they considered that they were bound by the previous decisions. The second case also decides important points. Mr. Davey has worked carefully through the whole subject, and discusses the difficult questions, some of which are not yet completely settled, with care. An addition of considerable value, and particularly in a book which is intended to be taken about the country to a distance from libraries, is the appendix taken from the *Law Journal Reports*, and containing the reports of all the House of Lords cases on the subject, which number no less than nine, and in four of them the West Ham Union was a party; the reports of four cases in the Court of Appeal, and of five in the Divisional Court.

Registration of Electors.—By C. G. E. FLETCHER. London: Butterworth & Co. 1908.—This is just what it purports to be, a practical guide for the use of those who have to take part in registration work, such as overseers, rate collectors, political agents, &c. It gives the law shortly, refers to a few cases, some twenty or so, and gives many useful practical hints. For the discussion and examination of difficult and doubtful points, Mr. Fletcher wisely refers his readers to Mackenzie and Lushington's Manual. The main legal interest is to see what is said of the so-called "latch-key" cases, namely, *Kent and others* v. *Fittall*, and *Douglas* v. *Smith*. We may notice on the way that the Table of Cases is constructed in rather an unusual way. The cases are not given, as is usual, in alphabetical order, nor chronologically, but in the order in which they are cited in the text. The two cases we have referred to form the main staple of the whole chapter on Inhabitant Occupiers and Lodgers. Mr. Fletcher considers that these cases have been much misunderstood; that they depend mainly on the findings of fact of the Revising Barrister, and that no question of law was raised. The working rule suggested is "that where the landlord is resident and unfurnished rooms in the dwelling-house are let to another person, there is a *primâ facie* presumption that such a person is a lodger."

Old Age Pensions Act 1908. By D. OWEN EVANS. London: Sweet & Maxwell. 1908.—The introduction to this work is by the Chancellor of the Exchequer. The book itself is written in popular form, and is avowedly intended for popular use. In a very carefully written introductory chapter the learned Author outlines the scheme

for granting pensions, and the effect of the statute itself. The notes to the text are carefully drawn up, and the authorities cited are to the point. In the appendices are collected the various Regulations which have been issued with regard to the Act itself. A very useful list has been compiled of the English, Welsh, Scottish and Irish pension authorities. The method of arrangement and matter comprised in this little work are both excellent, and will undoubtedly commend it to a large reading public not usually given to the perusal of abstruse law books.

The Money-lenders Act 1900. By J. B. MATTHEWS and G. F. SPEAR. London: Sweet & Maxwell. 1908.—Mr. Matthews has a very wide experience of cases in connection with money lending, and so is fully qualified to write on the subject with authority. In the present work he takes the Act of 1900 and annotates each section; the arrangement of his notes and the care with which he has selected the extracts from judgments is very highly to be commended. In the appendices are collected various cases taken from shorthand-writers' notes, which will be most useful, on account of their not being reported elsewhere. The learned Author finds fault with the reporters, being of opinion that they do not report really important money-lending cases, thinking that they turn so much upon their special circumstances. The Index is good, and at the end of the book are printed many Acts germane to the subject. Owing to the practical, as well as to the theoretical knowledge possessed by the Author of the subject upon which he writes, this little book will prove of enormous utility to the legal profession.

State and Family in Early Rome. By C. W. L. LAUNSPACH. London: George Bell & Sons. 1908.—The work under review only can by a stretch of language come within the category of a law book, but our law is so much based upon Roman law, that any historical description of the fountain head is of interest to lawyers. Rome as the infant and hobbledehoy, so far as any authentic history exists, is the story of the growth of a mighty State upon lines not altogether dissimilar to those upon which our Empire grew. With the Roman the family always was, *par excellence*, the mainspring of existence. Mr. Launspach shows with considerable skill the growth of this struggling child, until it reaches the dawn of the epoch in which the law was embodied in writing. The various phases of family life are outlined, and we have presented

before our eyes a vivid picture of the daily life of the early Romans in a form which cannot fail to interest the reader.

Third Edition. *Mozley and Whiteley's Law Dictionary.* By L. H. WEST, LL.D., and F. G. NEAVE, LL.D. London: Butterworth & Co. 1908.—This is a very useful little dictionary. We have looked into it here and there, and have almost invariably found what we were looking for. We rather doubt the utility of many of the translations of Latin maxims. Many of them are not worth the room they take up. We have noticed a few slips, such as the statement that on each Circuit Assizes are held four times a year. Spring Assizes are only held on part of the Northern and part of the North Eastern Circuit. To the list of Barons should be added those of the Cinque Ports. The Statute *De Hæretico Comburendo* applied to those heretics who having been convicted refused to abjure, as well as to those who relapsed. The instances given of the use of the word "Respite are" somewhat insufficient.

CONTEMPORARY FOREIGN LITERATURE.

Il Concetto della Natura e il Principio del Diritto. By G. DEL VECCHIO. Milan: 1908.

This is a half-legal, half-logical addition to the considerable volume of literature which regards the law of nature as an integral part of law. The writer bases his criticism largely on Hobbes and Bruno, especially from the latter's fifth dialogue (*De la causa, principio, e uno*), where he says that by one and the same ladder nature descends to creation of things and the intellect ascends to cognition of them. An English lawyer, possibly too much disposed by his environment to disregard the law of nature as a factor, may fail to see what is gained by a division of *orientazione* into *subiettiva* and *obiettiva* or the antithesis of *jus naturale* and *lex naturalis.* According to the author, a professor at Sassari, Hobbes dwells too much on the former to the exclusion of the latter. The book shows a competent knowledge of English authorities, even of recent ones, such as Mr. D. G. Ritchie and the Rev. A. J. Carlyle.

Tra l'Antipatriottismo di Hervé ed il Patriottismo degli Antihervestei. By E. CIMBALI. Rome: 1908.

This somewhat nebulous book is, like the last, the production of a professor at Sassari. Its gist is that no arbitration can be

effective, no national peace, civilisation, or prosperity lasting, unless a nation be free. Otherwise the nation is *prigione non patria.* He admits that at present

Sullogizò invidiosi veri.

But truths once invidious become the axioms of a future generation. He has a very mean idea of the freedom enjoyed by British colonies. The whole of the book is an attack on Hervé (*La Patrie de leurs Seigneurs*), who regards disobedience to authority as national suicide. But, replies the professor, a dependent must in some cases revolt. Else how would a united Italy have been possible?

PERIODICALS.

Journal du Droit International Privé. Nos. VII—X. Paris: 1908.—This opens with the first instalment of a valuable treatise on the position of foreign companies in France. A curiosity is an article on the position of aerial navigation from the point of view of International law. The view seems to be, take the law of the sea and apply it as far as possible to the air. It is mainly taken from Dr. Grünwald's *Das Luftschiff*, &c. (Hanover: 1908). Among the more interesting reported decisions are the following:—A native of Tunis is not of French nationality so far as to enable him to be admitted an advocate of the Paris Bar (p. 1108). The exception of *litispendance* cannot prevail unless the foreign Court be seized of exactly the same question (p. 1123). One thought-reader cannot have an injunction to restrain a rival thought-reader from a colourable use of the former's name. The Court will not protect an illegal trade. So held by the Supreme Court of New York (p. 1249). Where the law of a State forbids the marriage of persons suffering from tuberculosis, the defendant in an action for breach of promise of marriage who suffers from this disease has a good defence (p. 1254).

Zeitschrift für Völkerrecht und Bundesstaatsrecht. Vol. III, Part 1. Breslau: 1908.—This valuable periodical, under the joint editorship of Professor Kohler of Berlin and Professor Oppenheim, the distinguished successor of Professor Westlake at Cambridge, maintains its position as one of the principal authorities in the world on International and Constitutional law. The two articles

most interesting to English-speaking readers are one on the recent divorce case of *Eckardstein* v. *Eckardstein*, and another on the cases in which the Supreme Court of the United States has interpreted Art. I, sect. 10, of the Constitution, from *Dartmouth College* v. *Woodward* downwards.

Zeitschrift für Internationales Privat-und Öffentliches Recht. Vol. XVIII, Parts 3—5. Leipsic: 1908.—This part contains more decisions but perhaps not as interesting contributions as the volume just noticed. At p. 504 will be found the conventions of the Central American Peace Conference of 1907. There is a review of a Greek treatise on International law, published by G. Streit at Athens in 1906, one of the few which modern Greece has produced, though no doubt the science existed in embryo in that country in the classical period.

Deutsche Juristen-Zeitung. 1 Oct.—15 Dec. Berlin: 1908.—There is a good deal of discussion of reforms in the Criminal law. With regard to this, a monumental comparative work in fifteen volumes is advertised, under the title of *Vergleichende Darstellung des deutschen und ausländischen Strafrechts.* It is stated to be the necessary preliminary to a reformed code. Who owns Nietzche's letters? The question is discussed at p. 1297. The extraordinary view that Gaius was a woman is put forward at p. 1386. The theory is based on Gaius I, 144 & 190, and on a text from his *ad legem Juliam* in Digest XXXV, 1, 63. The text does not seem to prove much. It runs *si verum amamus, durior haec conditio est quam illa* " '*si non nupserit.*" But surely here Gaius (Gaia?) is not speaking of himself (herself)? The usual digest of decisions for 1907 is a useful supplement to the journal.

La Giustizia Penale. 24 Sept.—12 Nov. Rome: 1908.—At p. 1166 is reported a matter of practice to which the English Bar is entirely unaccustomed, the confrontation of the *parte civile* with the prisoner. There is an interesting decision on the Sunday rest law of 1907, to the effect that the proprietor of a shop is liable to penalties under the law, even though he employ no hired labour. At p. 1312 will be found some decisions on the old law of Sardinia and the Two Sicilies, still valid in spite of the Civil Code.

JAMES WILLIAMS.

WORKS OF REFERENCE.

Sweet & Maxwell's Diary for Lawyers, 1909. Edited by F. A. STRINGER and J. JOHNSTON.—This is undoubtedly one of the most useful Diaries for lawyers, the information given, and the Tables contained in it being both full and reliable. Considerable alterations and additions in the text of the present edition have been rendered necessary by the many new Rules and Orders of the past year, and so far as we have seen these appear to have all been made with the usual care and attention which characterise the work of the Editors of this Diary.

The Lawyer's Remembrancer and Pocket Book for 1909. By A. POWELL, K.C. London: Butterworth & Co. We have received a copy of the new issue of Mr. Powell's handy little work, and find its contents, as usual, thoroughly well revised and brought up to date. Among the new articles in the present issue is a useful outline of the Criminal Appeal Act 1907.

Fry's Royal Guide to the London Charities. Edited by JOHN LANE. London: Chatto & Windus. 1909.—This well-known annual serves a very useful purpose as a Guide both to those who give and those who take. There is, we should think, scarcely a single London charitable institution of any importance as to which full information is not to be found in its pages; and the Editor's preface reviewing the charitable work of the past year and the prospects of the current one is one of the most interesting features of the work. Carefully compiled, the book forms a reliable guide, and should be of great service to all contributors to the funds of Hospitals and other charitable institutions.

Books received, reviews of which have been held over owing to want of space:—Taylor's *Science of Jurisprudence*; Stephen's *Commentaries*; Clarke's *Selected Speeches*; Anson's *Law and Custom of the Constitution, Vol. II, Part II*; Wessel's *History of Roman Dutch Law*; Piggott's *Foreign Judgments*; Highmore's *Local Taxation Licences*; *Index, &c. to Vols. 1—90, Revised Reports*; Swan's *Quiet Enjoyment in respect of Landlord and Tenant*; Fletcher's *Weights and Measures Acts*; Manson's *Digest of English Case Law*; Latifi's *Effects of War on Property*; *Butterworth's Workmen's Compensation Cases, Vol. I*; *Chitty on Contracts*; Wilson's *Anglo-Muhammedan Law*; Beven's *Employers' Liability and Workmen's Compensation*; Konstam's *Rating Appeals, Vols. I and II*; *Butterworth's Yearly Digest for 1908*; Sykes' *Banking and Currency*; Holland & Nixon's *Banking Law*; Paget's *The Law of Banking*; Stroud's *Supplement to the Judicial Dictionary*.

Other Publications received:—*The Sin of Socialism* (London Literary Alliance); *Transactions of the Medico-Legal Society, Vol. V*; *Index to Legal Periodicals* (American Association of Law Libraries); Fry's *Finance Act 1907 in relation to Income Tax*; *The Civil Judicial Statistics 1907*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer* (India), *South African Law Journal.*

THE

LAW MAGAZINE AND REVIEW.

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I.—THE BAR IN BELGIUM.

WE have had occasion to discuss the history of the Bar in France, and to sketch that of the United States of America. That of Belgium differs from the first in its having a starting point within almost living memory, and from the second in having during the whole course of its history a definite constitution. Naturally, however, although of recent origin, the Bar in Belgium has its lineal ancestry in the Bar in France, and is the inheritor and the partaker of the great story and high traditions of that eminent Order.

Regarding that ancestry of the Bar in France, we will briefly indicate the main characteristics up to the time of the Revolution. Composed of several distinct local Orders, traditionally associated with as many distinct local jurisdictions, dating back to the ages when France had not yet been hammered out of various feudal demesnes, the Bar in France had at the head of its Orders the Order of the Bar at Paris attached to the great *Parlement* of the realm. The government of these Orders was partly external, depending upon a long series of royal ordinances, and partly internal, depending upon a long course of domestic observances. Amongst the most conspicuous of the latter would be the Rules of the Council of Discipline, which (together with the *Conférences de Doctrine*) provided the constitution for both

training and etiquette of the Bar of Paris. The Revolution destroyed the jurisdictions, disintegrated the associated Orders, and for the time being scattered the members of the profession. The first Napoleonic period was a period of transition. The Restoration in France, coincident with the separation of Belgium, henceforward left the Bars in each country to proceed along two different paths of evolution. The differences have been largely due to the divergency of political constitutions.

If one wished to institute a comparison between the Bar in Belgium and the Bar of the United States, one would be bound to observe the great capacity for progressive action in connection with constitutional evolution which each Order has displayed. It will be recollected that the United States of America in the first half of the 19th century was emerging into a position of high international respect, whilst in the early part of the 19th century the neutralisation of Belgium became effective. The Bar of the United States has had its energy largely occupied by the fashioning of a constitution and the evolution—out of a large number of sovereign States—of a world-power, and—out of a large number of separate jurisdictions,—of one authority. The Bar of Belgium has been devoting much of its activity to the evolution of juridical ideas, and of late, as a collateral matter of interest, to the federation of the branches of the profession throughout the world. The counterpart is perhaps found in the difference between the contemporaneous development of a system of Private International law out of a conflict of laws which the peculiar position of the United States has advanced, and of a system of Public International law out of a collection of rules of positive morality which the international neutrality of Belgium has assisted to forward. In each instance the Bar has had a part to play—in a manner in regard to which there is no analogy in any other country.

Now the separation of Belgium from France, and its reunion to Holland in 1815, left the organisation of its Bar as established under the Imperial Decree of 1810, and to that we must look for a statement of its constitution and for its rules of discipline.

The course of events in France must first be traced. In the preamble to the Napoleonic Decree of 1810, the re-establishment of the Roll of Advocates was said to be directed to the attaining of uprightness, delicacy, disinterested conduct, the wish for conciliation, and the use of truth and of justice. It set out to secure the freedom of the advocate and the nobility of his profession, whilst assigning the limits of licence. It was, however, obvious that in France the restrictions placed upon the practice of the profession, by reason of its being placed under the control of the political administration, were unnecessary and oppressive. The submission of the roll to the Minister of Justice, the necessity of his permission in order that the advocate might practice outside his particular Court, oaths of obedience, oaths of fidelity, the control of the Conseil de Discipline (and the conferring of its powers) by the Procureur-General as the officer of the State, the restrictions upon the mere meeting together of the Conseil, the penalties imposed upon what might be considered to be an attack upon established authority, the administrative punishment of an advocate for any violation of departmental prejudice, the compulsory retainer by the State in civil matters; all these were held to be matters of just resentment to the Bar of Paris, and all were matters which in the course of the next twenty years received the constant and uncompromising hostility of the Bar, until they were swept away in France by the ordinance of 1830.

From the beginning, in Belgium, there were difficulties. The Bar resented its limited constitutions, and still more, was resentful of the measures of the government. A royal

decree of 1817 added to the declaration of professional conduct an oath of allegiance. Later, the use of the Dutch language was imposed; always there was antagonism between the State and the Bar more or less suppressed.

The Revolution of 1830 created Belgium as a separate State. The status of perpetual international neutrality followed. With the Revolution of 1830 fell the application to Belgium of the provisions of the decree of 1810. In 1832, on the 7th August, the advocates finally incorporated themselves into a free association. In fact, they decided that the dignity and the necessity for independence of their Order were incompatible with the exercise of any authority over the deliberations and decisions of their Order relative to the exercise of their rights. They decided to nominate their own Council of Discipline after the fashion of the Order of the French Advocates of Pre-Revolution days. They, on their own account, formed an Official List. The Procureur-General tried to point out the illegality of their proceedings. Twice he made remonstrances against the recalcitrants, appealing to the Bars throughout the country, but each time in vain. On 30th June, 1832, the Statutes of the Bar were published.

The first article provided that the object of the Association of the Advocates of the Bar of Brussels was to maintain the dignity and the independence of their Order, to secure the defence of the poor, and to preserve progressive doctrines.

The third article provided that the exercise of the profession was (*inter alia*) irreconcilable with any public employment granted and paid by the Government.

The seventh article and those following asserted the right for the advocates of choosing the Council of Discipline, which was charged with watching over the preservation of the independence of the Order, with repressing whatever on the part of the advocate might be contrary to the principles of uprightness and honour which characterise the profession,

and with the establishment of an office for gratuitous consultation.

In 1836 an understanding was arrived at between the Government and the Free Association. They agreed to partially abrogate the decree of 1810 in order to constitute a new organic foundation, which since then has scarcely been the subject of any modification. During these six stormy years, from 1830 to 1836, the Bar of Brussels showed the most praiseworthy energy and the most rigid independence. It notably invested itself with the right of criticising, by decisions taken in full council, all the acts of the Executive authorising subversion of liberty, and did not fail to use its rights.

Apart from these questions between the State and the Bar, which constituted the fight for what may be termed its charter of freedom, conflicts of a more domestic character supervened.

It was during this period of the "Six Years'" War, also, that arose the conflict called "The affair of the Advocates of the Court of Cassation." The law of the 4th August 1832, organising the judicial system, created advocates to the Court of Cassation, which it termed "*Officiers Ministeriels.*" In October 1832, the Council of Discipline of the Order of the Advocates of Appeal declared: "The members of "the Association resolve not to recognise in the future as "advocate any one who shall accept this office, and to "refuse to communicate or confer with him or to sign his "pleadings or consultations in capacity of advocate—in a "word, of having with him any relations other than those "which concern ministerial functions." In spite of the efforts of the Bar of Appeal, the law remained in force. The 15th June 1833, the Court of Cassation, upholding its own advocates, declared their effective co-operation obligatory. The 21st June, the Council of Discipline answered unanimously that their members would not plead any longer

before the Court of Cassation. Up to 1843 the situation remained strained. On the 18th July 1843, a compromise was signed between the Bars of Appeal and of Cassation, and the dissension ceased. One came soon to consider the title of advocate to the Court of Cassation as an honour granted to the most distinguished advocates. On several occasions, however, they have renewed their protest against the practice which creates two Orders of advocates and appears contrary to the fundamental unity of the Bar.

Some years later there arose the question which has, in every State in which a Bar exists, at some time or another arisen—that is to say, whether an advocate inscribed on the roll could properly exercise (1) the functions of receiver in bankruptcy or (2) those of director of commercial companies. On the 10th April 1854, by the Council of the Order of Brussels, the formal decision of the Order in favour of the restriction was given in the following terms: "Seeing that the attributes of this kind are ir- "reconcilable with the dignity, with the independence, "with the special duties of the advocate who owes his "time, his studies, his exertions, not to agencies of business "of the nature of receiverships and to all kinds of opera- "tions and steps which are inseparable from them, but to "the general interests of society, to the defence of all, and "of every Court founded on justice and in equity." But a decree of reform was made by the Court of Appeal which decided that these functions were not incompatible with the advocate's profession.

As to the question of the directorships of commercial companies, first put in 1857 before the Council of the Order of Brussels and the Court of Appeal, relative to the general direction of a commercial company, it had been laid down in the terms that there existed an incompatibility between that employment and the exercise of the profession.

In 1883 a considerable number of advocates administered

the affairs of public companies. The Council of the Order of Advocates of Brussels took in this respect a strict view, of which the following is the chief point, "considering that "a director of a public commercial company must be taken "to carry on a business in the sense of the decree of 1810, "and that at the same time he fills a salaried post which "is equivalent to an employment for wages." The Court, however, reformed this decision 9th May 1883, and retained the advocates in question on the roll. The Council then regarding itself as attacked resolved "that advocates who have regard for the salutary and insistent traditions of the Order do not support this last decision of the Court."

Another entirely different question which has not been confined to the Bar of Belgium arose in 1882. The Council of Discipline of Brussels had to decide the question whether women could be admitted to practise the profession of the advocate. Under the old rule, which obtained throughout all the dominions of pre-Revolution France, a woman could not be an advocate; as to the decree of 1810 it is not explicit on this point. A Mdlle. Popelin having obtained the degree of Doctor of Law, asked to be admitted to the oath. The Court of Appeal at Brussels dismissed the application, and its decision of the 12th December 1888, amongst other proceeds, is based on this, "Seeing that the special nature of woman, the feebleness "of her constitution, the modesty inherent to her sex, "the protection which is necessary to her, her peculiar "mission to humanity, the demands and the obligations "of maternity, the training that she owes to her children, "the control of the household and the domestic hearth "entrusted to her efforts, place her in conditions little "reconcilable with the duties of the profession of an "advocate, and give her neither the necessary leisure, "strength, nor fitness for the strifes and labours of the "Bar." The review of this decision was rejected by the

Cour de Cassation the 11th November 1889. The judgment dismissing in especial said, "Considering that under "the old system conformably with the Roman law the "profession of an advocate was considered as a masculine "office, that the restraint imposed by good manners on the "woman does not permit her to fulfil." There is in this an echo of the "*quia levitate animi*" of the classic jurisconsult, which seems to be acceptable beyond the limits of Belgium.

During the long period in the course of which have been produced the incidents which have been briefly recalled, the relations between the Bar and the judiciary have been signalised with mutual courtesy and by a great regard for independence and dignity. Not that there have been no occasions when the Bench has tried to impinge upon the prerogatives of the advocate; but such occasions have been rare and short-lived in the face of protests, when the whole Order has given proof of its sentiments of confraternity. The thorny question of remuneration naturally has provoked some lively passages. In 1847, for example, decreeing on a contest regarding the *honoraria* claimed by two advocates, the first chamber of the Court of Appeal of Liège introduced into its judgment this opinion: "Considering that although "the *honoraria* claimed by those concerned have been taxed "at a high figure, they do not exceed the charges to which "it is generally the custom of the Bar to raise them; that "the introduction of a like custom is nevertheless deeply to "be regretted, since it alters the nature of the profession "and translates into salary what was formerly only a remuneration spontaneous on the part of the client." The Council of Discipline, moved by the grave offence which this criticism gave to the Order of advocates, addressed a strong remonstrance to the Minister of Justice, to the First President, and to the Procureur-General of the Court of Appeal, asking them to bring it to the knowledge of the

Court. And it was only when this demand had been granted that the advocates, who had abstained from appearing at the Bar of the First Chamber since the offensive decree, consented to plead again before that chamber.

There have been other occasions upon which something in the nature of a professional "strike" called attention to a grievance and enforced the remedy. In 1852 there was an occasion when the Council of Discipline of Brussels protested against the attitude of the President of the Tribunal of Commerce, who had uttered words thought to be derogatory to the Bar. It denounced these observations to the First President and to the Procureur-General. The Bar for a long time ceased to plead before the Tribunal of Commerce. The incident terminated by public declarations satisfactory to both bodies.

Another occasion, and the protest against the course taken by the order of advocates comes from the Court. In 1859 a conflict occurred at Antwerp. The Bar had addressed to the Legislative Chambers a petition, having for its object the reform of the Consular jurisdiction. The Tribunal of Commerce regarded itself as affronted, and protested whilst continuing to sit. The Bar arrived at a resolution by which it declared that it had not been in the mind of the signatories to the petition to be wanting in respect due to the tribunal: and after some time things resumed their normal course.

The activity of the Bar of Belgium during the last fifty years has shown itself in the creation of a large number of free institutions, some of which, such as the *Conférences du Jeune Barreau*, the *Fédération des Avocats*, *Comités de défense des enfants en Justice*, and so forth, we purpose to consider in the course of the present article.

We now propose to devote a short space to the actual organisation of the Belgian Bar.

The legal constitution, which actually regulates the Bar in Belgium, depends upon the decree of 1810, certain

articles of the decree of 1812, the decree of 1831, and certain royal pronouncements ranging from that of 1836 to that of 1891. The conspectus of these documents will enable the precise constitution, first of the judicial Courts, and then of the Bar in Belgium, to be determined. There are, according to the law of 1869, which regulates the judicial constitution of the country, in the first place, twenty-six Courts of First Instance, which are fixed at the principal centres; secondly, three Courts of Appeal, where the decisions of these Courts of First Instance can be reviewed, which are seated at Brussels, at Ghent, and at Liège respectively; and last of all, the final Cour de Cassation, which is held at Brussels. To each of these Courts a body of advocates is attached. There are thus twenty-six separate rolls of advocates, because in the three towns in which the Courts of Appeal are situate the roll of the advocates is the same for the Court of First Instance and for the Court of Appeal. To each roll is admitted an advocate who has fulfilled his period of studentship, and who has complied with the decree of 1889, which enacts that the profession of an advocate is incompatible with (a) all duties of judicial administrations (other than those purely gratuitous), except those of Minister of State, burgomaster, and municipal officer; (b) with the functions of registrar, notary, solicitor, and Court official; (c) with employment at a salary, or in regard to accountable agencies; (d) with any kind of commercial business or business agency.

The constitution of the tribunal of discipline of the Bar is as follows:—If the number of advocates is less than twenty in any particular Court centre, the Court itself safeguards its discipline. When the number exceeds twenty the advocates form in each year a general assembly, elect a *bâtonnier*, or president of the Order, select a Council of Discipline comprising (including the *bâtonnier*) five, seven, or at the most fifteen members.

The number of advocates in the year 1896–7 inscribed on the Roll: at Brussels, 598; at Ghent, 178; and at Liège, 247; at Antwerp, 191; at Charleroi, 131; at Mons, 121. The total number of Belgian advocates, including those who are still in their student stage, to a population of six millions, is 2,187.

The internal administration of each Order is insulated. The *bâtonnier* convokes and presides at its meetings. At public functions he represents the order. He intervenes in case of any dispute or untoward incident of audience, receives complaints directed against advocates, regulates or supervises the regulation of the business of the order, is consulted on professional difficulties and matters of etiquette, chooses advocates for internal offices, and generally administers the affairs of the Order.

In the terms of the decree of 1810 the Council of Discipline is charged with safeguarding the preservation of the honour of the Order, maintaining principles of uprightness and etiquette, which are the substratum of the profession, repressing or punishing by means of discipline, breaches or errors, without prejudice to any action of the Courts, if there are grounds for it: it will direct its close attention to the manners and conduct of students; it has the power in the case of habitual negligence, or of noteworthy misconduct, to extend the obligatory power of studentship, and even to refuse admission to the Roll of the Bar. In fact, its functions are analogous to those exercised by each of the four Inns of Court in England. The Council of the Order names its secretary, who is also the secretary of the Order, prepares the roll of the Order, forms the list of students, organises the office for gratuitous legal assistance, deals with difficulties relative to the modification of *honoraria*, and in this regard tenders its opinion to the Court.

The Council adjudicates upon disciplinary matters on the complaint of any party, or on the written requisition of the

Minister of Justice, the advocate criticised being heard or at any rate duly cited. It can inflict the following punishments:—warning, censure, reprimand, interdiction from exercising the profession for, at the maximum, a year, exclusion or expulsion from the roll; sitting with closed doors. Except in the case of a warning, there is an appeal to the Court of Appeal appropriate to the particular locality.

Advocates entered on the roll, in the three towns where there exist Courts of Appeal, plead before all the Courts in the kingdom. Speaking generally, the same rule applies to the advocates on the roll of any one of the towns where there exists a Court of First Instance. The proceedings in any of the Courts are, as a rule, in the French language. In regard, however, to certain of the Courts, Flemish is sometimes enjoined and sometimes permitted by law. The advocates in certain cases provided by law are called to supplement the judges of first instance. In the exercise of their profession the advocates wear the stuff gown, long sleeves, and black cap.

Partnership between advocates, as distinguished from collaboration, is not permitted. This is a provision by the traditions of the Order, rather than by any express regulation.

No State tax is imposed upon an advocate as such, but he may be required to pay certain local dues.

Advocates, together with other persons employed in a confidential character, are pledged to professional secrecy according to the provisions of the Penal Code, except in so far as they are obliged to give evidence in the course of the administration of justice, or other occasion when the duty of disclosure is specially enjoined by law.

The scale of professional remuneration is fixed, and in case of dispute taxed by the Order itself. Contrary to the rule which obtains in England, the Belgian jurisprudence recognises the right of the advocate to recover his fees by action at law.

The Bar of the Cour de Cassation is separately constituted. We have already said that, by the law of judicial organisation of 1832, the advocates of the Bar of Cassation are ministerial officers, who alone have the right of pleading before the Supreme Court. They can plead before all the Courts in the kingdom. They are named by the King on the commendation of the Court, and ought to be Doctors of Law of at least six years' standing. Their number (in fact twelve) is regulated by the Government on the advice of the Court. They are sworn in before the Court. A decree of 1836 contains the regulations for the Discipline of the Bar of Cassation. Each year the general assembly of the Order names a *bâtonnier* and a council of five, including the *bâtonnier* and the secretary. The Council prepares the roll of the Bar of Cassation. It is able to inflict the disciplinary punishments of warning, censures and reprimand, subject to appeal to the Court of Cassation.

The general rule is, that the advocates of any one of the three Courts of Appeal have audience in the Court of Cassation.

In order to be inscribed on the roll it is necessary to have taken a degree in law, and on the presentation of a senior advocate, to have sworn before the Court of Appeal an oath of fidelity to the king and the laws of the Belgian people, not to say or publish anything contrary to law or good conduct, the safety of the State or the public peace, to be never wanting in respect to the tribunal and to the public authorities, and not to counsel or defend a cause except that conscientiously believed to be just.

The applicant must, moreover, have completed three years of "*stage*," or what we should call pupillage. This course involves three legal obligations—diligent attention at the Courts, duly taking part in the proceedings in connection with the office for the gratuitous assistance of poor persons, and a careful study of rules governing the practice of the

profession. The *stagiaires* for the time being are divided into four sections, each controlled by a member of the Order with the assistance of four colleagues, and in this way takes place the allocation of an adviser to any indigent person seeking legal assistance. It is the rule, with scarcely any exception, that each *stagiaire* is attached to a senior member of the Bar, and works under his direction. The actual number of cases in which gratuitous assistance is given in any one year at Brussels alone approaches 1,500, and regarding the gratuitous defence of necessitous persons at the same place and period, the figure is about 1,200.

Such being the history and such the constitution of the Bar in Belgium, it now remains to add something regarding the rules which govern the practice of the profession. It may generally be said that those rules range themselves under the following heads: the obligation of honour in the conduct of cases, which is a matter which affects the Court and the State as well as his client; of independence in dealing with them, which is a matter which affects the advocate himself; of disinterestedness in regard to their result, which is a matter which affects the client; and of confraternity in regard to the other members of the profession.

Under the first head come all matters with regard to the maintenance of the obligations which are the essential conditions of admission to the Roll of Advocates. Nothing ought to be done, or said, or published, contrary to the law, to public manners, to the safety of the State, to the preservation of public peace. There must be no absence of the respect due to the Courts and to public authorities. His independence is absolute. With the sole condition of respecting the laws and customs of the realm, he can think, say, or write, what he thinks best.

An advocate must respect the secret of the confidences reposed in him by his client; what comes to him as an advocate belongs only to him who consults him. We may

take it, that in this regard, the rule of the Bar of France obtains in Belgium, and that the advocate even freed by his client from professional secrecy, although able to give evidence regarding facts which he has known as an advocate, remains sole judge in his conscience, from the point of view of knowing to what extent and in what circumstances he ought to make any deposition.

It is obvious that the advocate ought not to intervene in operations contrary to the dignity of the profession. It will be seen that this gives rise to questions of fact which under the circumstances raised in the controversy of 1854, to which we have before adverted, are not easy to settle; but the general sense of the profession in Belgium has known how to interpret this rule firmly and yet sufficiently stringently. It would, however, be considered as an exception to the rule against the acceptance of an agency, where the service in question is one which is undertaken in the interests of the family of the advocate, or even when he occupies himself gratuitously in the interests of a friend, of a confrère, or of a colleague.

An advocate ought to recommend himself only by his work, his knowledge, his pains and devotion to the business of his client. He is forbidden to seek to extend his clientèle, either by open advertisement, or by direct or indirect solicitation.

The rules regarding the professional remuneration of the advocate are founded on the bed-rock rule that the knowledge, eloquence, and reputation of an advocate are not the subject of a mercantile transaction. Any remuneration ought to be a free gift, the voluntary recognition of the gratitude of the client, although as we have said, Belgian jurisprudence recognises the right of the advocate to recover his fees by action at law. Gratuities dependent on the result of the process or based upon the amount recovered are not regarded as the proper subject of an

advocate's acceptance. It is regarded as having all the marks of an agreement *de quota litis* which has been severely forbidden to the Bar since the most early times, having for its baneful result the loss of the independence of an advocate by associating him with the chances of the litigation.

Confraternity is a professional duty, whether it is shown in respect to seniority or the observances of the decisions of constituted professional authorities, the interchange of courtesies, the safeguarding of the interests of professional confrères, the frank disclosure of documents relating to litigation between advocates opposed to each other at the audience in chambers at every point of contact.

It will be obvious from the foregoing that the Bar in Belgium is an institution strong and increasing in strength. The successive steps by which it has gained the complete freedom which it now enjoys, have not been unaccompanied by strenuous internal effort for the promotion of the training of its members, and towards the formation of even wider organisations for the advancement of the welfare of the forensic profession.

The *Conférences du Jeune Barreau* are directed to the training and progress of the younger members of the order. We have adverted above to the efforts for the codification and the recognition of the principles of Public International law, which, considering the status of Belgium as a neutralised State (and therefore one in which International law can be pursued and perfected with comparatively little national bias), have done much to promote the perfection of that advancing science. In the direction of the general interests of advocates themselves, considering them as jointly pursuing in their different national spheres common objects towards the general advancement of juridical ideas, they have equally been active and in the right direction. In 1886 the administrative committee of the Council arrived at a resolution which had for its objects the convening at

Brussels of a congress of advocates of all the different portions of Belgium, for the purpose of taking into consideration a project for Belgian Federation. A congress at Brussels followed in that year. The project was adopted and the statutes of the Federation framed in the presence of over 100 representatives from different parts of the country. The principal objects were set forth as being the furthering of the interests of advocates, regarded as one body in many provinces, and the development of fraternal relations between the Orders of advocates and the individuals composing those Orders throughout the whole country; and in particular, excluding from all discussions any burning political or local questions which might distract the union for the general good, both for the profession and the general advantage of judicial administration. Successive general meetings were held at Brussels, Liège, Antwerp, Mons, Ghent, Charleroi and Louvain. Closer union between the members of each Order and the Orders themselves, registration of documents, the subject of legal process, the reform of tribunals of commerce, the evidence of children, the use of the Flemish language, the relations with the other branch of the profession, judicial assistance to poor persons, professional avocations and attendant occupations, the method of recovery of remuneration, rights of audience, illicit exercise of the profession of an advocate, assistance to distressed members, relations with the Bars of foreign countries, reform of the system of law teaching, the jury system of judicial reorganisation. These are amongst the many questions which were taken into consideration, and, of necessity, in many of these discussions, old prejudices had to be encountered and new ideas ventilated. To sum up its objects I refer to the pamphlet of M. Emile Laude of Brussels on *La Fédération des Avocats Belges,* in which he describes its objects as "*participer ainsi à la défense des prérogatives du barreau dans*

"*toutes les circonstances qu'offre notre vie corporative agitée et*
"*active.*"

At length the idea of federation took a still wider scope. In 1894 a congress was held at Brussels, to which representatives of most of the countries of Europe were sent, for the purpose of putting on the widest possible basis, that is to say, the basis of International agreement, many of the matters controverted or not, concerning of the well-being of the Orders in the different States, and of the individual members of these Orders. At a meeting at Antwerp, which took place in 1896, the International Federation of Advocates was resolved upon, one of the objects being the comparative study of the forensic systems of different countries, in order to achieve the best reforms in that regard, as well as to promote confraternity amongst advocates the world through. The International Congress of Advocates at Brussels followed in 1897, and the work there done was continued and extended at the International Congress held at Liége in 1905. It is not proposed that the ground covered by that conference should here be retraced. Suffice it to say, that whatever may be the outcome of the movement for the International consolidation of the forensic profession throughout the civilised world, will be due to the initiation, enterprise, and organising activity of the members of the Bar in Belgium.

As we are here dealing with the Bar in Belgium, there are two collateral institutions to which some words ought to be addressed. And first the system of assistance to advocates in distress. The office was first constituted in 1894. Temporary grants may be made subject to repayment. They can equally be accorded to members or not of the Federation. The widow or children of an advocate can receive assistance.

Next in reference to the activity of the younger members of the profession. The association of *Le Jeune Barreau* was

created in the year 1840. It had originally in view discussions on questions of law by those in the pupil stage of their career; but its character and scope has, during the sixty years of its existence, considerably altered and expanded. The organised forensic discussions in the way of moots, the arrangement for the defence of persons criminally charged before the inferior Courts, the circulation of a newspaper, the *Palais*, devoted to the interests of the profession—these are some of the directions which that expansion has taken. It comprises in its honorary or effective membership practically all the members of the Bar and the *stagiaires*, its affairs being administered by a committee of eleven members. Their efforts may be summed up as directed to the following objects: (1) moots; (2) parliamentary debates; (3) lectures; (4) the regular teaching of professional rules and practice; (5) gratuitous defence of accused persons; (6) the consideration of works for the special instruction of the profession; (7) the formation and administration of a library; (8) the preparation for special conferences; (9) the relations between young advocates both at home and abroad; (10) the discussion upon questions of permanent or urgent interest to the profession; (11) the publication of a legal newspaper. From the opportunities of observation which have been afforded to the present writer, it would appear to be a far more co-ordinated association than anything similar which exists in England, differing in the direction of recognition and continuity from ordinary students' societies, and having a considerable divergence from that analogous part of our Inns of Court by reason of the complete system of self-government amongst its members. One very important aspect of its work is the extensive part which it has taken during recent years in the defence of children charged with crime, and in what may be called the organisation of means for the prevention of cruelty to children. Still another sphere of their activity

is in connection with the dealing with prisoners freed at the end of their term of imprisonment.

With all this it must not be supposed that the Bar in Belgium is without its proposals for further reform. Better methods of selection of magistrates, more uniformity in rules of practice between the Bars of the different provinces, the revision of rules relating to the profession, such as the determination of incompatible occupations, the alteration of the form of oath to the simple "*Je jure de remplir en conscience mes devoirs d'avocat*," the compulsory insurance of provision, the publication of decisions of the Councils of discipline, and the re-constitution of those Councils, the re-organisation of legal education; these are some of the matters which keep alive that divine discontent which makes for the vitality of an Order as for the evolution of a being. Nevertheless it can with confidence be asserted that the Bar in Belgium is an Order with a notable history, possessing a rigid regard for all that tends to the elevation of its office and the fearless discharge of its duties, and with tendencies progressive to a signal degree.

The writer desires to place on record his obligations to many of the members of the Bar of Belgium for the kind assistance which they have rendered to him, and he may be forgiven for singling out M. Jaspar, the widely-known *rapporteur* of the Central Bureau of the International Federation of Advocates, of M. Emile Laude also of Brussels, of M. Bia, *ancien bâtonnier* of the Bar of Liège, and of M. Franck of Antwerp, who have in various ways and at different times advanced this attempt to describe the history, constitution and practice of the advocates of their country. That I have not more fully been able to avail myself of the material which they have placed at my service, is the difficulty almost unsurmountable which confronts a stranger essaying to describe from observation a system with which in action he is unfamiliar. The mere attempt,

however, must at any rate serve as evidence of that gratitude which arises from a recollection of so many acts of friendship.

EDWD. S. COX-SINCLAIR.

II.—THE LAW OF THE UNIVERSITIES.

VIII. PRIVILEGE.

PRIVILEGE attaching to universities is no new thing.[1] In the Roman Empire a constitution of Diocletian and Maximian, about 300, put students of law at Berytus in a privileged position.[2] So did the constitution of Justinian, *Omnem reipublicæ*, sect. 9, introductory to the Digest (533). The same was done for Bologna by Frederic Barbarossa in the constitution *Habita*, promulgated at Roncaglia in 1158, and strangely included in the Code of Justinian.[3] The privileges of English universities have been continually recognised by charters and by Parliament, and are still jealously guarded by the university authorities. Delegates of privileges are annually appointed at Oxford. The privileges are based partly on immemorial usage, partly on charters and statutes confirmatory of rights existing by papal bull or usage, partly on statutes conferring new privileges. Most of them are what may be termed negative—that is to say, they are in the nature of exemptions from the law attaching in similar matters elsewhere. Some are obsolete, either by abandonment or by legislation.[4]

[1] "A university without privileges is like a body without a soul," says Bulæus, i, 98. [2] Cod. x, 49, 1. [3] Cod. iv, 13.

[4] Among these may be named the licensing of premises for the sale of wine or ale, of booksellers, and of carriers, the right to probate of wills and to goods of suicides. Licences to beg were issued up to 1572. King's had the right to create notaries and to hang on its own private gallows (2 Rashdall 574). The privilege of nobility (*jus natalium*) existed at Oxford up to 1868, at Cambridge up to 1884. The English universities never claimed the Parisian privilege of cessation—*i. e.*, the closing of the university during disputes with the Crown. Vienna seems to have done something very like it as recently as 1908.

The most important existing one is the jurisdiction of the university courts, to be separately treated in the following chapter. Another important one is the exemption of the universities and colleges from the disability to take gifts in mortmain under which most corporations lie. Part I of the Mortmain and Charitable Uses Act 1888 (51 & 52 Vict., c. 42, s. 7) applies to the universities and their colleges, so that they cannot accept gifts in mortmain, that is, gifts for other than charitable purposes, without a licence in mortmain from the Crown. Nor can they purchase lands out of revenue or capital without a licence. But a licence once granted is good for all time, and most colleges are in possession of such a licence, generally up to the amount of a sum named. Part II of the Act (*i. e.*, that relating to charitable uses) does not apply to "an assurance of land or personal estate to be laid out in the purchase of land to or in trust for any of the universities of Oxford, Cambridge, London, Durham, and the Victoria University,[1] or any of the colleges or houses of learning within those universities[2] . . . . or to or in trust for the warden, council, and scholars of Keble College."[3] The practical effect of this is that gifts for the purposes named in the section may be made without the restrictions imposed upon ordinary charitable gifts by the Act of 1888 and by the Mortmain and Charitable Uses Act 1891 (54 & 55 Vict., c. 73). In order to fall within the exemption, gifts must be such as the law would regard as

[1] The old federal university is meant, not the new Victoria University of Manchester. It and the universities of Liverpool and Leeds are now in the same legal position.

[2] The Act would no doubt apply to all colleges, whether founded before or after the Act. It was held that the previous Mortmain Act of 1736 applied to colleges founded before it (*Christ's College Case* [1757], 1 W. Bl. 92).

[3] The exemption probably would not apply to a corporation sole who is, like the Master of Pembroke was, at the same time a member of a corporation aggregate. Nor would it apply to the Chancellor of Oxford, who, according to an old decision, possibly not law now, is a corporation sole (*Chase's Case*, Y. B. 8 Hen. VI, 18).

charitable. By sect. 13 of the Act of 1888, references to charities within the meaning of 43 Eliz., c. 4 (repealed by the Act), are to be construed as references to charities within the meaning of the preamble to 43 Eliz., c. 4, that is to say, the preamble is still the standard for determining what a charity is. Among other objects named in it are the maintenance of schools of learning[1] and of scholars in universities. It seems from this, that a trust for the support of a scholar or exhibitioner, not attached to any university or college, would be an ordinary charitable use, and would not fall within the exemption of sect. 7. The Universities Act 1877 provides by sect. 60 that a licence to alien or take or hold in mortmain shall be unnecessary in respect of cases of compulsory purchase of lands for university or college purposes, allowed by 19 & 20 Vict., c. 25 (Cambridge), and 20 & 21 Vict., c. 88 (Oxford).[2] A conveyance to a university or college needs no words of limitation. The limitation, if used at all, should be to "successors." Where a gift which is regarded by law as a charitable gift is made by will and

[1] Universities and colleges are included under schools of learning ([1767], *A.-G.* v. *Downing*, Wilmot, Opinions, 1). Gifts for the foundation of fellowships, scholarships and prizes have been held to be charitable. For a discussion of the meaning of "charitable purposes," see *Commissioners of Income Tax* v. *Pemsel* ([1891], A. C. 531). Lord Bramwell in his judgment says, "Charity, in its legal sense, comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor." This meets the case of fellowships and other endowments for persons who could not be called objects of charity in the popular sense of the word.

[2] Even before the Mortmain Act of 1736 a devise to a college, though void as a devise to a corporation, might have been supported under 43 Eliz., c. 4. This was held in the case of a devise to Jesus, Oxford, of lands in Cardiganshire for the support of a scholar of the founder's blood (*Flood's Case* [1616], Hob. 136). It is otherwise where the devise is in trust. Tancred devised an estate to Christ's and Caius for certain studentships to take effect as a charitable gift if contrary to the Act of 1736. It was held good as a charitable gift, but not good under the exemption of the Act, which only protects gifts for the benefit of the college (*Christ's College Case*, above).

refused in whole or in part, the gift or the residue of it is generally administered *cy-près*. Under this principle on the University of Oxford declining a gift of £2,000 for a prize in divinity on the terms of the will, it was granted on other terms.[1] In another case scholarships were given to Trinity Hall, and on that college declining, were transferred to St. John's, Oxford.[2] Property was originally given in part for the purpose of redeeming British captives in Africa, in part to endow scholarships at the universities. A scheme was approved for increasing the number of emoluments of the scholars.[3] In a more modern case, a testatrix had bequeathed a sum of money in 1643 to be applied to the relief of the poor and the apprenticing of poor boys in the parish of Kensington. A scheme was settled by the Charity Commissioners for diversion of part of the charity for, *inter alia*, exhibitions at higher places of education. This scheme was confirmed by the Court.[4] The doctrine of *cy-près* has had statutory sanction in the Act dissolving chantries, I Edw. VI, c. 14, and diverting their revenues for the benefit of schools and universities, and in the Endowed Schools Act 1869. Under this Act no scheme may be made by the Charity Commissioners interfering with any exhibition forming part of the foundation of any college in Oxford or Cambridge without the assent of the college.

A gift to a university or college, to be within the exemption of the Mortmain Act, must be for university or college purposes. An instance of such a gift of real estate was made in 1640 for the purchase of books and the repair of the library of Trinity, Oxford. Accretions in the revenue were applied by the Court to augment the income.[5] A devise of a house to a university, not for academic or collegiate purposes, but that a fellow of the college should

[1] *Denyer* v. *Druce* [1829], cited 3 Hare, 194.
[2] See Appendix.
[3] *A.-G.* v. *Bishop of Llandaff*, cited 2 Myl. & K. 586.
[4] *Re Campden Charities* [1881], 18 Ch. D. 310.
[5] *A.-G.* v. *Marchant* [1866], L. R., 3 Eq. 424.

occupy it, was held void under 43 Eliz., c. 4 and the Act of 1736.[1]

The universities have considerable privileges in the matter of press monopoly and copyright.[2] By 15 Geo. III, c. 53, Oxford and Cambridge, the Scottish universities, and Eton, Westminster and Winchester, have the sole right of printing and reprinting such books as shall have been or may be bequeathed to them, provided the books be printed at their own presses and for their own benefit. By 39 Geo. III, c. 79, the university presses of Oxford and Cambridge need not be licensed. The Copyright Act 1842 (5 & 6 Vict., c. 45) enacts that the Bodleian Library at Oxford,[3] the public library at Cambridge, and the library of Trinity College, Dublin, have a right to a copy of every book or edition published in the United Kingdom on demand, under the hand of the officer of the Stationers' Company appointed for the purposes of the Act.[4] The Act saves all rights of the universities named, and also of the Scottish universities, Eton, Westminster and Winchester, to all subsisting copyrights. This would include copyrights under 15 Geo. III, c. 53, and the monopoly of publishing bibles,[5] prayer books, and statutes[6] *pari passu* with the King's printer.[7] The right

[1] *A.-G.* v. *Whorwood* [1750], 1 Ves. Sen. 534. To the same effect is *A.-G.* v. *Munby* [1816], 1 Mer. 327.

[2] For the Oxford Press see Blackstone's *Law Tracts* and F. Madan, The Oxford University Press (1908).

[3] The right of the Bodleian Library vested originally on an indenture made between Sir Thomas Bodley and the Stationers' Company in 1610. Apart from the Copyright Act, the library is entitled under that agreement to a copy of every book printed by a member of the Company.

[4] The university libraries only obtain the books after due demand; the library of the British Museum is entitled to a copy without demand.

[5] This applies only to the plain English text, not to annotated editions or to editions in other languages, such as the Vulgate or the Greek Testament, or modern versions, such as those published by the Bible Society.

[6] In *Baskett* v. *Cambridge University* [1758], it was held that the privilege of printing statutes was shared with the King's printer.

[7] All these privileges are remnants of originally greater ones. Letters patent in 1532 allowed Oxford and Cambridge three printing presses each, subject to the approval of the Chancellor or Vice-Chancellor and three doctors. An ordinance

of printing almanacks has been decided not to be a monopoly of the universities.[1] In consequence of the decision, 21 Geo. III, c. 56,[2] was passed, granting the universities an annual sum of £500 as compensation. Copyright in lectures has been already mentioned. Books printed at the university presses need not bear the name of the printer, but must bear "Printed at the University Press, Oxford," or "the Pitt Press, Cambridge," as the case may be (2 & 3 Vict., c. 12).[3]

Parliamentary representation of Oxford and Cambridge, two burgesses each, was first granted by charter of James I, dated 12th March, 1603–4, in accordance with the opinion of Sir Edward Coke, then Attorney-General. No occupation or other property qualification is necessary for the electors for burgesses of the universities.[4] The electors are members of Convocation or of the Senate who are of the degree of M.A. at least, as long as the degree is not honorary. The procedure at elections is governed by 16 & 17 Vict., c. 68; 24 & 25 Vict., c. 53; 31 & 32 Vict., c. 65. The Vice-Chancellor or his deputy is returning officer. Elections last five days; the voting is public; and the vote of a non-resident elector may be given by means of a voting paper attested by a justice of the peace or other authority. This privilege is specially preserved by the Ballot Act 1872.

of the Star Chamber of 1585 allowed only three presses in England, one in London, one at Oxford, and one at Cambridge. Every book must have been approved by the Archbishop of Canterbury or the Bishop of London.

[1] *Stationers' Company* v. *Carnan* [1765], 2 W. Bl. 1004.

[2] Repealed by Statute Law Revision Act 1861.

[3] The terms in modern times have been altered to "Clarendon Press" for Oxford and "University Press" for Cambridge. It may be doubtful whether there is now any privilege of omitting the printer's name, the Act having been repealed in 1869. A reference to any books printed at a university press will show that the name of the printer to the university is given.

[4] Up to 21st May, 1885, graduates of colleges residing in rooms in college had no votes for the city of Oxford or the borough of Cambridge, a disability confirmed by sect. 257 of the Municipal Corporations Act 1882. This was altered by the Registration Act 1885, s. 15, and they are now inhabitant occupiers, subject, of course, to sufficiency of residence and full age.

The privileges as to licensing public-houses and inspecting weights and measures are preserved by the Licensing Acts and the Weights and Measures Acts, except as altered by Acts specially affecting the universities. For instance, the power of the Vice-Chancellor to license alehouses at Cambridge was abolished by the Cambridge Award Act 1856.[1] Wine licences depend on 11 Geo. II, c. 40. As far as regards Oxford, such licences, having been previously resigned by decree of Convocation, are now granted by the mayor under the Oxford Corporation Act 1890 (53 & 54 Vict., c. ccxxxiii). A curious exemption is that from the restrictions imposed on the growth of tobacco by 12 Car. II, c. 34, and other Acts. The Acts allow tobacco to be grown to the amount of half-a-pole in the botanic garden of a university. Oxford is exempt from the jurisdiction of the College of Arms. Vice-Chancellors and heads of houses were, when a property qualification for magistrates existed, exempt from it by 18 Geo. II, c. 20, as far as regarded the counties of Oxford, Berks, and Cambridge. The universities and colleges are exempt from the jurisdiction of the Charity Commission, except as to school exhibitions, with the assent of the university or college (16 & 17 Vict., c. 137; 32 & 33 Vict., c. 36). A resident member of a university is not bound to serve in the militia (42 Geo. III, c. 90).

The remaining privileges to be mentioned are of an ecclesiastical character. The head of a college is usually the ordinary. If in holy orders he must apparently still read the morning prayer once a quarter (14 Car. II, c. 4, s. 13). There are some curious provisions as to the language in which the liturgy may be used. By 2 & 3 Edw. VI, c. 1, matins, evensong, litany, and all other prayers—the Holy Communion commonly called the Mass excepted—may be said in Greek, Latin, or Hebrew in

[1] It had been admitted by the King's Bench in 1840 on the ground that it was necessary for the prevention of disorder among the younger students (*R.* v. *Archdall*, 8 A. & E. 281).

college chapels not being parish churches. By 14 Car. II, c. 4, s. 14, morning and evening prayer and all other prayers and service prescribed by the Act may be used in Latin. The Act does not expressly repeal the Act of Edward VI, but as it is inconsistent with it and later in date, it is probable that Latin is now the only authorised foreign language. By 27 Hen. VIII, c. 42, and 1 Eliz., c. 4, the universities and colleges are discharged from the payment of first fruits and tenths. The presentation to benefices in the gift of Roman Catholics was first conferred on the universities by 3 Jac. I, c. 5. Further provisions were made by 1 W. & M., c. 26; 13 Anne, c. 13; 11 Geo. II, c. 17; 10 Geo. IV, c. 7; and the Benefices Act 1898 (61 & 62 Vict., c. 48). By sect. 7 of this Act the universities may elect to a benefice in the gift of a Roman Catholic patron a clerk who already has a cure of souls. This had been forbidden by the previous Acts. Oxford presents in the south and west of England, South Wales (except Glamorgan), and the City of London; Cambridge in the north and east, North Wales, and Glamorgan.[1] The statute 1 & 2 Vict., c. 106, dispenses heads of houses, the warden of Durham, and certain head-masters from the penalties for non-residence on their benefices. Professors or public readers, while resident and lecturing, are privileged for temporary non-residence. The Canons of 1603 contain a considerable amount on the subject. A fellowship[2] or residence at the university of a M.A. of five years' standing is a title for orders, and the universities have co-ordinate rights with the ordinary in the right of licensing a lecturer or reader in divinity or a

[1] The question as to any disputed right of presentation is generally tried by *quare impedit* in the High Court or *duplex querela* in the Spiritual Court. The university had to prove that the patron was a popish recusant (*Chancellor of Oxford's Case* [1614], 10 Rep. 53). For a lengthy and strongly contested case see *Lord Petre* v. *Cambridge University* [1692], 2 Lutw. 1100.

[2] This privilege appears to have been originally confined by papal bull to New College and King's. It is a title now only in the dioceses of Oxford and Ely; but other bishops may admit it at their discretion.

preacher in a cathedral or collegiate church.[1] In one case what may be called the reverse of privilege obtains. A presentation of the head of a college to a living by the college is void because presentor and presentee are the same. Illogically, because the alleged ground is the same, this does not apply to the presentation of a fellow. The old privilege of holding deaneries and certain other appointments with headships was abolished by 13 & 14 Vict., c. 98, the deanery of Christ Church excepted. The same Act forbids the holding of cathedral preferment with headships, unless where it is part of the endowment, as at Pembroke, Oxford.

One of the Canons, obsolete since the change in the law made by the Endowed Schools Act 1869, enabled the ordinary to license a curate who was of the degree of B.A. or M.A. to teach where there was no public school. Other matters connected with the universities for which the Canons make provision are the wearing of surplices in chapel on Sundays and saints' days, and the production of a testimonial from a college before admission of one of its graduates to holy orders.[2]

The Private Chapels Act 1871 (34 & 35 Vict., c. 66) enacts that the bishop of the diocese may license a college chapel, except for solemnisation of matrimony. The minister of such a chapel is subject to no control or interference on the part of the incumbent of the parish. The offertory and alms are to be disposed of as the minister shall determine, subject to the direction of the ordinary. It should be noticed that a university as well as a college may be a rector, though it could not be a vicar. Thus Cambridge was created Rector of Somersham by 45 & 46 Vict., c. 81.

JAMES WILLIAMS.

[1] This *licentia concionandi* is still nominally competent by the Oxford statutes, ix, 7, 1.

[2] Forgery of such a testimonial would probably not be a misdemeanour at Common law, judging from the analogy of a case in which it was held that it was not criminal to forge a diploma of the College of Surgeons with intent to induce belief that he was a member of the college (*R.* v. *Hodgson* [1856], Dears. & B. C. C. 3); but forgery of the college seal, if attached, would be a felony.

III.—RESTITUTION OR COMPENSATION AND THE CRIMINAL LAW.

AN effort is being made in many quarters—notoriously by the Howard Association and Sir Robert Anderson—to introduce restitution, or more generally compensation to the injured, into the Criminal law. So far as the argument in favour of this change is based on the Mosaic law, I need not enter into it at any length. The Mosaic code may have been well suited to the Israelites in the wilderness or even in Palestine, but it is quite unsuited to the present state of society in this country, and no sane man would seek to revive it as a whole. Restitution in the Mosaic law, however, was a punishment, and where it was adopted, in most cases at least, no other punishment was inflicted. The punishment consisted in restoring *more* than what had been wrongfully taken—sometimes as much as four-fold. Simply restoring what has been taken is, in fact, no punishment. It is treating a theft as a loan. It is no punishment to a debtor to order him to pay what he owes. He is sometimes punished, and severely punished, for not paying it. But even this is not regarded as a part of our Criminal law. It is a part of our Civil Code. The State takes no part in it, leaving the creditor to set the law in motion or not as he thinks fit. I hope the law on this subject will be amended at an early date, but the change will certainly not be in the direction of making non-payment of a debt a crime, or of imposing the duty of collecting debts on the State. But multiple restitution is a punishment, and formed part of a code which contained no provision for imprisonment. I do not think simple compensation, any more than restitution, should be regarded as a punishment. If a man kills my horse he is as much bound to pay the value of it as if he steals it, or borrows it and allows it to be sold, or distrained for rent.

Compensation or restitution is often allowed where there has been no crime, and a civil action is the only remedy. There are wrongs which are not crimes, and damages may be recovered for what can hardly be described even as wrongs. But in none of these cases does the State undertake to compensate the injured person. It is left for him not merely to set the law in motion, but to take every subsequent step to recover the damages to which he is entitled. The question then arises: When the wrong is a crime, should the State undertake of its own motion and at its own cost to obtain compensation for the injured party, or leave the latter to pursue his remedies in the same manner as if the wrong which he has suffered were not a crime? And another question follows, viz.: Where the wrong is a crime, should the State enforce payment of compensation to the injured party by means which are not open to an injured person who has recovered damages as plaintiff in a civil action?—for I suppose no person would propose to enforce payment of damages recovered in an action for trespass by keeping the trespasser in prison at forced labour until he had earned enough (after providing for his own maintenance) to pay the damages in question. I confess that I cannot see why I should have any greater facilities for recovering the value of my watch from a man who has stolen it than from a man who has deliberately or carelessly smashed it. The State may be justified in taking a different view of the man's conduct in the two cases, but my position is the same in both. I have lost my watch through the wrongful act of another man. I have a right to recover the value of it from him in both cases. But on what ground should the State recover it for me in one case (using drastic means for the purpose), while in the other the recovery is left altogether to myself with no such drastic methods at my disposal? If it be replied that, though the claim of the injured person is not stronger, the conduct of the injurer

is worse and it is therefore reasonable to punish him by applying more drastic means for recovering the damages, the answer is two-fold. First, unless restitution or compensation is the only punishment inflicted, the injurer has been otherwise punished for his misconduct, and it is unjust to punish him a second time for it; and secondly, the punishment thus inflicted would be a very unequal one, for one prisoner might be able to pay the compensation without much inconvenience, while another might spend his whole life in a vain effort to earn it, although the amount to be paid was the same in both cases. Speaking more generally, the object of punishment by the State is the public good, and the best punishment is that which is most conducive to the good of the public. But it is by no means true that the good of the public always coincides with the good of the injured person, and if we inflict punishment solely or mainly with a view to the interests of the latter, we are pretty certain to miss doing what is best in the interests of the former.

Then let it be observed that a prosecution and conviction is pretty certain to interfere with the offender's power of making restitution or compensation. A trial costs money, and the accused is often kept idle in prison for some time before it comes on. He probably loses his occupation, and will, in consequence of his conviction and imprisonment, find it difficult to procure employment on his release. But the advocates of restitution do not usually seem disposed to give him the chance of obtaining employment. They propose to keep him in confinement, under more or less rigorous conditions, until he has earned the assessed compensation by forced labour. His earnings under such conditions will always fall short of their ordinary amount, but with some classes of persons the reduction would probably be sufficient to exclude all chance of earning the requisite sum. Take, for instance, one of those numerous

persons who earn their bread by writing, by keeping accounts, by travelling, as motormen, engine-drivers, conductors, sailors, porters, &c., &c. How could these men be expected to earn the restitution-money if kept in confinement at forced labour of some rude manual kind? Freedom is absolutely necessary for many offenders if they are expected to earn enough to compensate those whom they have injured.

The advocates of compensation seem to admit that while the prisoners are kept at this forced labour the proceeds ought to be first applied towards the costs of their own maintenance, so that the enforcement of compensation should cost the public nothing. But I do not think there is any prison at present in existence in which the earnings of the prisoners exceeds the cost of their maintenance (including the up-keep of the prison and its staff). At all events, while the earnings of the prisoners would probably fall short of the earnings of ordinary free labourers, the expense of maintaining them would much exceed the average; and if there remained any surplus from their labour available towards making compensation it would be, a small one; while in individual cases the offender's earnings would often be represented by a negative quantity. Age, ill-health, mental weakness and similar causes, would often reduce his earnings to a sum insufficient to pay for his maintenance. Is he to be kept in prison, at a loss to the public, in trying to make him pay what it is clear that he cannot pay?

Then the prisoner may have a wife and family. What about them? Is the man who has been defrauded entitled to have the prisoner's earnings paid to him in priority to the claims of his wife and family, who will probably have to be supported by the rates, for the benefit of the injured person? Again, the prisoner may have debts of considerable amount. Men heavily in debt are often driven

by stress of circumstances to commit frauds before the final crash comes. Are the victims of these frauds to be paid in priority to all other creditors? We must reform our Bankruptcy laws altogether if we desire to effect this result. In these kind of cases the criminal is usually adjudicated bankrupt, and all creditors are equalised in the bankruptcy. Are we then to give one particular class of creditors the sole right of appropriating the proceeds of the bankrupt's future labour? (The advocates of restitution, I need hardly say, do not propose to give the criminal any chance of effecting a composition with those whom he has injured, however hopeless the task of earning enough to pay them in full may be.)

The proposal made—at least by Sir Robert Anderson—is, that on the conclusion of every criminal trial in which the prisoner is convicted, the jury should at once proceed to assess the damages to which the injured person is entitled. Who is to have the conduct of this new trial and to bear the expense of it—the State or the injured person? And is it reasonable, if the State pays the costs of conducting the plaintiff's action for damages, that it should refuse to pay the defendant's reasonable costs in having the proper amount ascertained? Then, if the inquiry is to be proceeded with at once, both parties must have their witnesses in Court ready to give evidence. Who is to pay the costs of bringing the plaintiff's witnesses there, and instructing solicitors and counsel with regard to the damages, if the accused should be acquitted, or the jury should disagree, or for some other reason no conviction should be arrived at? On the other hand, if the prisoner, confident of an acquittal, has come unprepared with evidence as to the assessment of damages—and, perhaps, that tendered by the injured person may take him altogether by surprise—is he to have no means of avoiding an assessment which may involve a much longer sentence than that imposed on

him for the crime of which he has been convicted? Then what of appeals? If he appeals against the conviction and has it set aside, of course the assessment of damages will be set aside also—and, then, what about the costs of the futile inquiry on the subject? And what effect will a free pardon have on the assessed damages?

Let me apply these remarks to the case of Adolf Beck. Fifteen women were, I believe, defrauded by the same man; but five of them failed to identify Beck, and therefore he was not convicted of defrauding them. So, of course, though they were plainly in the same boat as the other women, they could obtain no compensation—unless they changed their minds and identified Beck. The other ten would be entitled to compensation. How was the amount to be assessed? The prisoner, not being the real criminal, knew nothing on the subject, and could not give, or call, any evidence as to value. The trinkets had probably been pawned, but the police failed to trace them—or, if they traced any of them, kept the information to themselves, because it would not aid them in procuring a conviction. The only evidence as to the value of the trinkets in question, or even as to their number and nature, would be that of the defrauded women, who belonged to a class not remarkable for truthfulness. This, perhaps, may be an extreme case, but it is clear that a person, wrongfully convicted, would be placed in a specially disadvantageous position as regards the assessment of damages enforceable by penal detention of indefinite duration.

Let me next take the case of a professional pickpocket. He is caught with a stolen watch in his possession which is returned uninjured to the owner, who is therefore only entitled to nominal damages. He has stolen from a great number of other persons who cannot bring the crime home to him; and even if he were tortured to extract the truth from him he would probably be unable to give the names

and addresses of those whose pockets he had picked. He gets off with the present sentence though a much greater rogue than the man who is doomed to spend his whole life in trying to repay, by the proceeds of penal labour, a sum of money which he appropriated under strong temptation as his first offence.

The State is not bound to give every citizen complete protection against theft, fraud or injury, nor could it do so if it tried. It is therefore not bound to compensate every person who has suffered from theft, fraud or injury. This, I think, will be conceded. But, it is said, the State is bound to compel the person who commits the injury to make restitution or compensation to the person whom he has injured. This I do not admit. It is bound to give the injured person reasonable facilities for obtaining restitution or compensation if he desires to institute proceedings for the purpose; but I do not see why, because the injury is regarded as a crime by the law of the land, the injured person should be allowed any other means of procuring restitution or compensation than if it were not so regarded. A crime is a wrong which it is necessary to punish in the interests of the public, but I fail to see why this infliction of public punishment on the wrong-doer should render it more easy for the injured person to recover damages. On the contrary, the infliction of punishment in the public interest usually renders it more difficult for the prisoner to pay damages, and should therefore, I think, afford a ground for mitigation of damages. The more severely a man is punished for his crime the less able will he be to make compensation to the person whom he has injured.

At present it often happens that when there are several charges of a similar kind against the same man, the prosecutors, after obtaining a conviction on one or two of these, decline to proceed with the others. But if the right to compensation depended on a conviction, to adopt this

course would be to deprive the injured parties of their rights in all the cases which were dropped. All the trials should therefore proceed; and the person who claimed to have been injured might complain bitterly of a case being dropped, although the evidence was in fact so weak that the result of a trial would undoubtedly be an acquittal. Let me add, that the injured person is often more or less to blame for what has occurred, and to give him full compensation—especially if there are other creditors who are kept waiting till he has been paid—would be by no means beneficial to the public. All trials should be conducted for the public good—at least so far as the public pays for them. Trials at the public expense conducted for the benefit of individuals, would be an anomaly; and the case becomes worse if the public has to take up the cause of these individuals without any inquiry into their merits. Suppose, for instance, that the injured person has left large sums of money under the control of an underpaid clerk, is it for the public advantage that he should have modes of recovering what the latter misappropriated which are not open to the honest traders who supplied the same clerk with food and clothing on credit? Theorists on such subjects are too much in the habit of looking only to the injurer and the injured, without considering how third persons may be affected by their proposed legislation; but, in addition to this, the law has already recognised in many instances the necessity of confining drastic remedies for the recovery of money within moderate limits, and I hope that ere long further limitations will be imposed. "Thou shalt not come out thence until thou hast paid the uttermost farthing" is a principle which belongs to the legislation of the past, not that of the future, and the days have passed when life-imprisonment for non-payment of a debt which (whether incurred by crime or otherwise) cannot possibly be paid, will be tolerated by the public. It is sufficient

for the State to provide the proper machinery for doing justice between man and man. It should be left to the interested parties to set that machinery in motion and keep it going till its work is done.

LEX.

IV.—THE COURTS OF EGYPT, AND OF THE SUDAN.

THE Musulman law in particular, and divers other elements, are common to Egypt and the Sudan; but, as the Courts of the two countries are entirely independent of one another, they must be treated separately.

THE COURTS OF EGYPT.

We will first review the Courts of Egypt, where the extraordinary complexity of the legal position arises in great part from the fact that it rests upon three several jurisdictions, each asserting in principle its own exclusive competence: these are the jurisdictions repectively exercised by (1) The Consular Courts; (2) The Mixed Tribunals; (3) The Native Tribunals, including for the present purpose the Mekhemehs, being the Musulman Religious Courts.

(1) *The Consular Courts.*

The Consular Courts, prior to the establishment of the Mixed Tribunals in 1876, exercised a very wide jurisdiction, both civil and criminal, in virtue of a series of treaties, commonly known as the Capitulations, commencing in the 16th century, and made between the Sublime Ottoman Porte and the several countries, whose subjects resided within, or for commerce and other lawful purposes, resorted to the dominions of the Porte.

Such Capitulations asserted, within those dominions, the same principle of privilege in favour of foreigners, as was

conceded also in other oriental countries, whose customs and laws were alien to western usages, and sense of security.

By the Capitulations foreigners were granted the right of exterritoriality, giving them immunity from the jurisdiction of the native tribunals, both civil and criminal, and rendering them subject only to the laws of their respective countries, as administered by their own Consular Courts, set up within the Ottoman dominions.

Japan has already made herself entirely free from the obligations of similar Capitulations, and in Egypt, on the civil side, the Consular jurisdiction has been very materially reduced by transferring to the Mixed Tribunals, as will be seen hereinafter, such civil matters as touch parties who are not all of the same nationality.

Formerly any civil suit between foreigners of different nationalities had to be entered in the forum of the defendant, that is, in his Consular Court; now such a suit is dealt with by the Mixed Tribunals. In criminal matters, except as to certain petty offences, and others specially prescribed in the Statute of Judicial Organisation, and as to offences against the Bankruptcy Laws, which have recently been brought within the jurisdiction of the Mixed Tribunals, foreigners remain triable only by their respective Consular judges.

For the present purpose we will only concern ourselves with the British Consular Courts in Egypt. They are regulated by the Ottoman Order in Council 1899 (and a supplementary Order of 1905), together with the Rules made thereunder.

As regards Egypt the limits of the Order are declared not to extend to any place south of the twenty-second parallel of North latitude, so as to exclude the Sudan. By the said Order there are constituted the Supreme Consular Court, and Provincial and Local Courts: the Supreme Court ordinarily sits at Constantinople, and one of the

judges, as occasion requires, usually about three times a year, holds assizes at Cairo and Alexandria: both in civil and criminal matters an appeal lies from an inferior Court to the Supreme Court, and from the latter to the Privy Council, but, in a criminal case, only by leave of the Supreme Court.

A "Legal Practitioner" is defined to include barrister-at-law, advocate, solicitor, writer to the signet, and any person possessing similar qualifications. The Supreme Court may make rules providing, amongst other things, for regulating the mode in which legal practitioners are to be admitted to practise in the Consular Courts, and for withdrawing the right to practise on grounds of misconduct, subject to appeal to His Majesty in Council.

Legal practitioners are generally styled advocates, and combine the work of barrister and solicitor. By the Supplementary Order of 1905 the Secretary of State may, from time to time, appoint a competent person to act as Crown Prosecutor in Egypt, the holder of the office not being precluded from private practice.

Subject to the provisions of the principal Order, the civil and criminal jurisdiction conferred thereby may be compendiously stated to be exerciseable, as far as circumstances admit, on the principles of, and in conformity with, the Common law, the doctrines of equity, and the Statute law, for the time being in force in and for England.

It may be noted, as indicative of the proper intent of the Order, that one express provision of real local importance declares that, if a British subject publicly derides, mocks, or insults any religion established, or observed, within the Ottoman Dominions, he shall be guilty of an offence, and, on conviction thereof, be liable to a fine not exceeding one hundred pounds, or to imprisonment for two years with or without a fine.

Perhaps the most important judgment recently recorded

in the Supreme Consular Court is that given on the 19th April, 1907, in the case of *In the goods of William Torrey Grant, deceased.* This case raised a point of law, which had from time to time been much discussed, but upon which no direct judicial decision had theretofore been pronounced, the question involved being as to the law applicable to the succession to the real estate, situate in Egypt, of the said deceased, who, having a Scotch domicil, died intestate, without issue, and unmarried.

As to domicil, it will be remembered that the case of *Abd-ul-Messih* v. *Farra* (L. R., 13 App. Cas. 431), in effect decided that it is impossible to acquire an Anglo-Egyptian domicil.

The question in the *Grant Case* arose out of an administration action, which was necessarily brought in the Mixed Tribunals, because under the Statute of Judicial Organisation establishing them, those Tribunals are declared to have jurisdiction in all actions relating to real rights over immoveable property between any persons, even persons belonging to the same nationality; but the Tribunals, following their usual practice, referred the question, so far as it related to personal status, to the determination of the British Consular Court.

It was argued that, by the terms of Art. 77 of the Mixed Civil Code, "Successions are regulated according to the laws of the nation to which the deceased belongs," the land was to be dealt with as if it were land descendible to the heir, to be ascertained according to the Scotch law, and that any other view would lead to a vicious circle, or *renvoi* of interpretation. The British Court in rejecting this argument, and declining to read into the said Article any words of qualification, reasserted the well-known principle that, according to the law of England, it is the law of the country, in which land is situate, that regulates succession to it; therefore, as to the real property, the law to be applied, in

the case referred to the British Court, was the Musulman law of inheritance, as enforced in Egypt.

It seems remarkable that, although by the Imperial Rescript of the 18th June, 1867, foreigners were expressly allowed to hold land situate within the Ottoman Dominions (and in fact they had held land there under collusive titles prior to that date), the question decided in the case above mentioned had not come up before for judicial decision; but amongst foreigners (other than British and those of some of the United States), whose laws of succession recognise no difference between realty and personalty, the question would hardly be likely to arise.

(2) *The Mixed Tribunals.*

The Mixed Tribunals formally commenced their functions on the 1st February, 1876, as the outcome of an International Commission, consisting of delegates of the European Powers and of the United States, treating with the Government of Egypt, contracting autonomously, and for such a purpose free from the control of the Sublime Porte.

The United Kingdom gave its final adhesion by a convention, signed on the 31st July, 1875, by Sir Charles Cookson, H.B.M. Acting Consul-General, and Cherif Pacha, Minister of Justice of the Khedive.

The charter of the authority of the Mixed Tribunals is styled the "Statute of Judicial Organisation for Mixed Suits in Egypt," whereby it was declared that, for the space of five years from the said date of the installation of the Tribunals, that is, the 1st February, 1876, no change might be made in the adopted system. "After that time, if experience has not confirmed the practical usefulness of the judicial reform, it shall be open to the Powers, either to return to the old order of things, or to consider, in conjunction with the Egyptian Government, what other arrangements should be adopted."

In agreement with the Powers, by Khedivial decree of the 6th January, 1881, and by successive decrees, the existence of the Tribunals has been continued for further terms of five years up to the present time; power being reserved for the Egyptian Government to put in force during the currency of any term additions to, or modifications of the General Judicial order and the Codes, subject to approval previously given by the Powers. It has sometimes happened that one or more of the Powers, probably for diplomatic reasons, have refused assent to a prolongation for the full term of five years, but during the provisional extension have come into line, and accepted the normal period.

There are three Courts of First Instance, sitting respectively at Alexandria, Cairo, and Mansourah, with a separate district attached to each Court.

The Court of Appeal, formed of two co-ordinate chambers, sits at Alexandria, partly because that city is the most important commercially, and partly perhaps because its atmosphere may be deemed to be more serene, and less highly charged with the diplomatic elements that suffuse Cairo, the political capital of the country.

The Judges are native and foreign, all nominally appointed by the Egyptian Government; but, as to the foreigners, with the assent and authorisation of their own respective Governments: thus in effect all the Powers appoint Judges, Great Britain appointing two to the Court of First Instance, and one to the Court of Appeal. Their contract of service is for the current term of five years, renewable with the prolongation of the Tribunals, and, in respect of each term's service, the judges, in addition to their salaries, receive an agreed sum as an indemnity in lieu of a pension.

The judicial languages are four, namely, Arabic, French, Italian, and English, the last having been introduced by a decree of 1906; but, as few of the Judges are familiar with the English language, it is not yet much employed in the Courts, French being the most useful vehicle.

The Egyptian Codes, approved by the International Commission aforesaid, are based upon the *Code Napoléon*, and to a great extent textually reproduce its provisions; the procedure also follows closely the French model.

The Codes are the Civil, the Commercial, and the Code of Civil and Commercial Procedure. There is also a Penal Code, but for the present it is inoperative, except within the limits indicated in the Statute of Judicial Organization, that is, as to petty offences ("*contraventions*") and as to certain felonies and misdemeanours directly affecting the administration of justice and its officers: further, by Decrees of 1900, criminal jurisdiction in bankruptcy was extended to the Mixed Tribunals.

Article 9 of the Statute of Judicial Organization declares the competence of the Mixed Tribunals thus:—"These Courts shall have exclusive jurisdiction over all civil and commercial causes, not coming within the law of Personal Status, between Egyptians and foreigners, and between foreigners of different nationalities. They shall also have jurisdiction in all actions relating to real rights over immoveable property between any persons, even persons belonging to the same nationality"; and Article 10 says:—"The Government, the Administrations, and the Dairas (*i.e.*, Councils, such as the Councils of the Duchies of Lancaster and Cornwall) of the Khedive, and of the members of his family, shall be subject to the jurisdiction of these Courts in proceedings by or against foreigners."

Great Britain further renounces, in favour of the Mixed Tribunals, any competitive jurisdiction by the express proviso to Article 12 of the aforesaid Ottoman Order in Council 1899, "Provided that as regards all such matters and cases as come within the jurisdiction of any Egyptian Courts established with the concurrence of Her Majesty, the operation of this Order is hereby suspended until Her Majesty by and with the advice of Her Privy Council shall otherwise order."

The conditions required for the practice of the profession of an advocate before the Mixed Tribunals are controlled by General Rules of the Court made under the Statute, which lay down that, to be entered in the roll of the Order of Advocates, it is necessary to (i) hold the diploma of an advocate, (ii) bear an unsullied reputation, (iii) reside in Egypt, (iv) have served a five years' probation in connection with one of the Mixed Tribunals of Egypt. As to the last condition it is provided that any time, during which advocates shall have practised their profession in their own respective countries, shall be reckoned towards fulfilling the said condition, so that a foreign advocate of five years' standing may represent parties in the Courts of First Instance, and, if of eight years' standing, he may practise in the Court of Appeal.

The internal government of the Order of Advocates is vested in the Council, elected annually in general meetings, at which also are elected the *Batonnier* and his Deputy, who are *ex officio* members of the Council.

Any reputable legal diploma, subject to the conditions mentioned above, suffices to secure admission to the roll of Advocates who, as in the Consular Courts, act both as barristers and solicitors.

The advocates are a sufficiently numerous body, recruited from many nationalities, and from divers places set apart for the study of the law; in the presentment of a case the written arguments (*conclusions*) are more important than the oral pleadings, in which, however, there is opportunity enough to demonstrate that, in respect at least of vehemence and subtlety, those bred in the British schools of law can claim no pre-eminence over their learned friends from Paris, Padua, and the Orient.

Two or three points of special interest in relation to the law and practice of the Mixed Tribunals may here be noted:—the most important points, perhaps, relate to land,

as to which the neighbouring owners have the right of pre-emption; and ownership, and real rights as against third parties, rest upon priority of registration of documents of title. There is no specific law of Patent and Trade Marks, but the jurisprudence of the Mixed Tribunals has built up a very effective protection against infringements, and provides summary measures for its application; the inadequate scale of costs awarded to a successful party tends to encourage vexatious litigation, while, as between advocate and client, the amount allowed on taxation is also too low, purporting to be fixed according to the importance of the dispute, the intrinsic merit of the work done, and the means of the parties; hence an advocate must usually take advantage of the rule of Court which allows him at any time to stipulate for special fees for his pains and attention: nevertheless, he may not acquire, in whole or in part, the subject-matter of the litigation entrusted to him as counsel.

In respect to the conflict of laws, by a recent decision in the case of the City and Agricultural Lands of Egypt Limited, a company registered under the English Companies Acts, the Mixed Court of Appeal has made an important contribution to the interpretation of private International law, in declaring the said company null and legally non-existent in Egypt, upon the principal grounds that its administration and operations being carried on altogether in Egypt, it ought to have complied with the requirements of the local Egyptian law controlling limited companies, the first of which requirements is that it shall be constituted under the authority of the Khedive's firman: other requirements *inter alia* regulate the subscription of the capital of a company, and prohibit the issue of founders' shares.

In further assertion of their jurisdiction (and it may be unduly extending its limits), over English companies working in Egypt, the Mixed Tribunals in more than one case

have ignored the liquidator approved by the British Consular Court, and, the body of creditors being mixed, have assumed the conduct of the winding-up and appointed their own liquidator.

Prior to a Khedivial Decree promulgated on the 24th of December, 1906, some inconvenience had resulted from the Court of Appeal sitting in two divisions, or chambers, of co-ordinate authority, and occasionally, though very rarely, giving conflicting decisions. In virtue of that decree a new Article has been added to the Code of Procedure, providing that, where there are conflicting decisions concerning a point of law requiring to be decided in any subsequent case, or when a division of the Court of Appeal shall be in favour of departing from the view previously taken, it may order a re-hearing, and send the case before the full Court.

The parties can only attack judgments, not otherwise open to appeal, by way of a motion to review (*Requête civile*) for one or more of these reasons:—(1) If the Court has omitted to give judgment upon any one of the counts of the claim; (2) when the opposite party has been personally guilty of deceit of such a kind as to influence the decision; (3) if, after judgment rendered, documents used in the case have been admitted, or judicially found, to be forged; (4) if the party moving has recovered conclusive documents kept back by his opponent; (5) if the judgment was given upon matters which formed no part of the claim; (6) if one and the same judgment contains contradictory provisions.

From the nature of the position, having regard to the international constitution of the Tribunals, no court exists to which an appeal lies from the Mixed Court of Appeal: the most a disappointed litigant can do is to invoke the diplomatic aid of his own country, and that with but a very slender hope of intervention being made in his behalf.

Finally, Article 468 of the Code of Procedure declares that a judgment, given abroad by a foreign Court, shall be

enforceable in Egypt upon the mere order of the President of the Tribunal, upon condition of reciprocity on the part of such foreign country.

No reciprocity in this regard is recognised between the Mixed Tribunals and the Courts of the United Kingdom.

(3) *The Native Tribunals and Mekhemehs.*

In criminal cases the Egyptians—a term which connotes all local or Ottoman subjects—are under the exclusive jurisdiction of the Native Tribunals: in civil matters also, provided that no foreigner is in any way a party thereto or interested therein, they are subject to the jurisdiction of the Native Tribunals, or of the Mekhemehs, the latter being substantially Religious Courts, having their jurisdiction restricted to questions of personal status, and to Wakfs, that is, properties subject to private family settlement, or dedicated to public charitable uses: in addition, alternatively with the Mixed Tribunals, they record registrations of deeds relating to land; for dealings therein between natives may be registered either at the Mixed Tribunals or at the Mekhemehs, but so that an official statement of all such transactions shall be transmitted for record from the one to the other, by the Mixed Tribunals to the Mekhemehs, or by the Mekhemehs to the Mixed Tribunals, as the case may be.

As against third parties, the provisions of the Native Civil Code, as to the establishment of real rights by registration, closely follow the words of the Mixed Code in that behalf: it must, however, be noted that in neither case does such registration give an indefeasible title; because such registration is the registration, not of title, but of the deeds affecting any given property. One of the legal reforms now being actively discussed lies in the proposal to establish in Egypt a system of registration of title, analogous to the Torrens system. It is further proposed to consolidate and

fuse the present competing systems of land registration, and to decentralise and multiply the Registries, placing them all under the direct control of the Ministry of Justice.

At the present day comparatively few of the land registrations are effected at the Mekhemehs, and consequently an unmanageable amount of work is thrown upon the Mixed Registries, which are only three in number, situate at Cairo, Alexandria, and Mansourah respectively; and are consequently in a state of chronic congestion.

Since the Reform, as the installation of the Mixed Tribunals is usually called, the importance of the Native Tribunals in respect of civil matters has very materially declined, though they may be said still to possess a jurisdiction and competence parallel to the authority of the Mixed Tribunals.

But, in commercial matters at least, it is comparatively rare to find a substantial transaction going on, in which there does not exist a foreign element; this element automatically proclaims the competence of the Mixed Tribunals, and, if it is not present in the first instance, the assignment to a foreigner of the chose in action, in whole or in part, provides a ready way of ousting the Native jurisdiction: of course, when a foreigner assigns his rights to a native, the converse happens.

So in Bankruptcy matters the Native Tribunals, as well as the Consular Courts, generally find their jurisdiction excluded by the presence of a foreign or mixed interest.

The Civil jurisdiction of the Native Tribunals is regulated by the Native Civil Code, framed under the Khedivial Decree of the 14th June, 1883, which, so far as it goes, is in effect a condensed reproduction of the Mixed Codes.

By reason of the difficulty of pleading in the Arabic language, comparatively few of the foreign advocates seek to be admitted to the Bar of the Native Tribunals, preferring

to transfer to a native colleague cases which fall within the jurisdiction of the Native Courts.

It is in respect of criminal jurisdiction, which is governed throughout by the Native Penal Code, that the Native Tribunals have preserved and developed their importance under the constructive guidance of the late and present Judicial Advisers. The procedure has much in common with that of the French system, being controlled by the *Parquet*, at the head of which is the *Procureur-General*, whose office, since the revision of the Penal Code, has been filled by an Englishman, save for a short interval during which he was (not altogether successfully) replaced by a Native; but the experiment is now to be tried again of charging a Native with the responsibilities of that most delicate and responsible position.

Amongst the Judges of First Instance, having both civil and criminal jurisdiction, there are several Englishmen, and a larger number of Englishmen and other Europeans in the Native Court of Appeal, of which the Vice-President, and administrative head, is also English.

Prior to 1905, criminal appeals were brought before the Court sitting in Cairo, which had to decide them upon the badly written and often inaccurate records of proceedings, which had generally taken place several months previously before the Police, the *Parquet*, and the Court of First Instance, and these documents, except in very difficult and serious cases, had been read by only one Judge of the Appeal Court, that is, by the *Juge Rapporteur:* hence grave doubts and uneasiness were produced in the public conscience when, as occasionally happened, the Court of Appeal convicted and sentenced to death in cases where the Court of First Instance, which had heard the witnesses, had only sentenced to imprisonment, or had even acquitted.

By the law of the 12th January, 1905, a fundamental reform was effected by the establishment of Assize Courts

at the larger towns, where three Judges of Appeal from time to time go on circuit and try the cases direct, as sent up to them by a Committing Magistrate, the proceedings formerly taken before the Court of First Instance being omitted. The Appeal judges now see and hear the witnesses, and give their final decision near the place where the crime was committed, at a time when it is still fresh in the public memory, and in the presence of the relations and friends of the prisoners. There was a good deal of difference of opinion as to the advisability of abolishing criminal appeal in the way above mentioned; the reform has, however, been fully justified by the satisfactory results obtained.

In the year 1905 a further beneficent reform was made in the establishment of Children's Courts, having power to deal with juvenile offenders otherwise than by a sentence of imprisonment, and thereby helping to cut off the flow of criminality at its sources.

Both in the administration of criminal justice and in the treatment of prisoners, there are in Egypt many active and intelligent persons, desirous of working out the best principles of penology.

The Mekhemehs are the Courts of the Cadis: as has been above stated, their jurisdiction is restricted to matters of personal status and wakfs. For some time past it has been evident that these Courts stand in urgent need of reform, in respect both of personnel and of procedure; but such reforms cannot be introduced faster than is desired by Mohammedan public opinion. Unhappily the rights of litigants to a great extent have been at the mercy of the particular doctrinal predilections of individual judges, since each Cadi is apt to rely upon the interpretation of his own particular favourite among the doctors of the law. The procedure, however, is in course of simplification and unification; already the execution of judgments is more

expeditious, and the tariff of fees has been materially reduced: it is further proposed that the Mekhemehs should abandon to the Native Tribunals all matters relating to private wakfs, only reserving to themselves questions appertaining to charitable wakfs, since the former are usually pure questions of private rights and property, whereas the latter generally involve religious questions in a greater or less degree: it may be mentioned that wakf property cannot be dealt with by way of sale, but only by exchange for property estimated to be of equal value.

As for the Cadis, until recently the practice has been to select men who have completed their studies at the University of Al-Azhar at Cairo, where the training provided is mainly religious, and does not extend to such supplementary subjects as administrative law, and the general organisation of government. In 1906 there was established a training college for Cadis, on the lines of that organised by the Austrian Government at Sarajevo, in Bosnia. The college is under the management of a Committee, composed of the Sheikh of Al-Azhar, as President, the Grand Mufti of Egypt, the Headmaster of the college, and two members nominated by the Minister of Education, in agreement with the Minister of Justice. The Headmaster is a former student of Al-Azahr, who was trained at the Nasryeh Training College, and completed his studies in England. It is clear that the foundation of this new school has met with the approval of the Moslem community in general, from the fact that there were nearly 1,000 applications for admission, against an available accommodation for 200 students.

Upon a review of the constitution and state of the Courts of Egypt, the question naturally arises as to when, if ever, Egypt will be able to assert its own judicial independence, as Japan has done, so as to consolidate and erect one national Tribunal, which shall absorb or abrogate the three

separate jurisdictions now exercised by the Consular Courts, the Mixed, and the Native Tribunals respectively; from the nature of the case the special jurisdiction of the Mekhemehs must in part at least be preserved. In his Reports on Egypt for 1904 and 1905, Lord Cromer discussed the desirability of modifying the system generally known as the *régime* of the Capitulations, and in his report for 1906, being the last made by his lordship, he examines the criticisms addressed to the modifications proposed by him. He disclaims the intention of advocating substantively a measure of judicial reform. "What in my opinion," Lord Cromer writes, "is required is not a reform of the judicial, but of the legislative system. Judicial reform, in any important degree, is only advocated in so far as it is a necessary complement to the adoption of an improved legislative system. The reason why a change in the legislative system is required is because, subject to certain limited exceptions, no important law can at present be made applicable to the foreign residents in Egypt without the consent of fifteen different Powers."

The proposal of Lord Cromer indicates the partial abolition of "legislation by diplomacy," and the substitution of a plan, under which a local Council, composed wholly of Europeans, would have certain restricted powers of legislation. No law, such as would now require the consent of the Powers, would come into force unless it had been accepted by a majority of the Council, and unless it had received the assent of both the Egyptian and the British Governments. Lord Cromer, in summing up, concludes that his proposal involves the perpetuation to all time of the judicial system generally described as that of the Mixed Courts, also the maintenance of the Consular Courts until such time as a law abolishing them shall have been passed by the European Legislative Council, and shall have received the assent of the British and Egyptian Govern-

ments; their continued existence would be incompatible with the contemplated new *régime*; moreover, seeing that the administration of civil justice in Egypt has been internationalized with results that are satisfactory, there seems to exist no fundamental difficulty, which would prevent the essential principles of internationalization from being carried out with equal success in the case of the administration of criminal justice. If we accept this scheme of evolution, the merger of the Consular Courts into the Mixed Tribunals would only be a matter of time. But the Native Tribunals are not within the purview of such a scheme. It seems therefore impossible to contemplate the unification of the three judicial systems above mentioned in the political conditions of Egypt as they exist to-day; the complexities of the legal systems can only be completely resolved at or after the time when the political situation shall have been established upon a plain and permanent basis.

THE COURTS OF THE SUDAN.

The *condominium* of the British and the Egyptian Governments over the Sudan is regulated by the agreement entered into between them on the 19th January, 1899, the text of which is set out in what may claim to be a document of considerable historical importance, being the first number of the *Sudan Gazette*, published by authority of the newly-created Sudan Government.

The preamble of the agreement recites *inter alia* that it has become necessary to decide upon a system for the administration of, and for the making of laws for the reconquered provinces, under which due allowance may be made for the backward and unsettled condition of large portions thereof, and for the varying requirements of different localities.

The following articles relate specifically to the laws to be made under the said agreement:—

"Art. IV.—Laws, as also Orders and Regulations with the full force of law, for the good government of the Sudan, and for regulating the holding, disposal, and devolution of property of every kind therein situate, may from time to time be made, altered, or abrogated by Proclamation of the Governor-General. Such Laws, Orders, and Regulations may apply to the whole or any named part of the Sudan, and may either explicitly, or by necessary implication, alter or abrogate any existing Laws or Regulations."

"Art. V.—No Egyptian Law, Decree, Ministerial *Arrêté*, or other enactment hereafter to be made or promulgated, shall apply to the Sudan, or any part thereof, save in so far as the same shall be applied by Proclamation of the Governor-General in manner hereinbefore provided."

"Art. VIII.—The jurisdiction of the Mixed Tribunals shall not extend, nor be recognised for any purpose whatsoever, in any part of the Sudan, except in the town of Suakin."

This Article VIII expressly excludes the Mixed Tribunals, and Article X is equally important, since by its terms it effectually precludes the right to establish Consular Courts within the Sudan, in enacting that "No Consuls, Vice-Consuls, or Consular Agents, shall be accredited in respect of, nor allowed to reside in the Sudan, without the previous consent of Her Britannic Majesty's Government."

In the same number of the *Sudan Gazette* formal notice is given that "Whereas claims are being made to land in the Sudan, which are in many cases conflicting, and whereas ordinances will shortly be issued providing for adjudication on such claims, it is hereby notified to all whom it may concern that, pending such adjudication, no intending vendor of land in the Sudan is in a position to give a good and valid title to such land." Such adjudications are steadily proceeding.

Save for the religious laws, upon taking up the administration and civilisation of the Sudan, the Governor-General found himself invested with absolute powers, and with white tables whereon to write the laws of the country.

The position was dealt with thus:—The Civil Justice Ordinance of 1900 was promulgated, following the Sudan Penal Code and Code of Criminal Procedure of 1899.

As to the law to be administered in civil matters, the said Ordinance declares that, Where, in any suit or other proceeding in a civil Court, any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of Wakfs, the rule of decision shall be:—

(*a*) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared void by competent authority;

(*b*) The Mohammedan law, in cases where the parties are Mohammedans, except in so far as that law has been modified by any custom, as is above referred to.

Then follows a comprehensive section, enacting that, in cases not provided for by the rule of decision above given, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

Four classes of Civil Courts are established. They are the Court of the Judicial Commissioner, and the Courts of Magistrates of the first, second, and third classes respectively. For the purposes of the Ordinance a Mamur (Governor of a District) is, by virtue of office, a Magistrate of the third class, an Inspector a Magistrate of the second class, and a Mudir (Governor of a Province) is a Magistrate of the first class.

The Judicial Commissioner is an English barrister of high standing who has the general control and superintendence

over all Civil Courts. The Mudirs and Inspectors are almost without exception British, being military officers or civilians, and the Mamurs are natives or Egyptians. Subject to the supervision of the Court of the Judicial Commissioner, the Mudir controls the Civil Courts within his Province.

The Governor-General is given power to appoint Deputy Judges of the Court of the Judicial Commissioners, in the exercise of which power several barristers have been appointed as Civil Judges, but some of them are employed on land settlement and registry work.

The Courts established under the Ordinance alone have power to decide as to their own competence, except that they are expressly declared not to be competent to decide questions between Mahommedans, relating to personal status, as above indicated, without the consent of all the parties: such questions are to be referred to a competent Religious Court.

The Judicial Commissioner, with the consent of the Governor-General, may make rules for the hearing of any class or classes of cases with assessors.

The civil procedure is governed by similar provisions to those to be found in several Orders in Council, and there are general rules regulating appeals, with or without leave as the case may be, from inferior Courts to the Court of the Mudir, and from the Mudir's Court to the Court of the Judicial Commissioner; finally the Judicial Commissioner has been constituted his own Court of Appeal, by the provision that he may, for sufficient reason, review any decree or order which has been passed by himself; but a subordinate Court may only review its own decree or order by order of the Judicial Commissioner, or Mudir, as the case may be.

The new Law Courts at Khartoum are now completed and opened, and there is in course of constitution a High

Court for the Sudan, consisting of all the Civil Judges, of whom three or more sitting together are to form a Court of Appeal.

A Training College for Cadis has also been established in connection with Gordon College, at Khartoum, the graduates of which are reported to be doing extremely well in the District Religious Courts.

From time to time supplementary Ordinances are promulgated to provide for omissions from the original Ordinances and for new developments: such are the Harbours and Shipping Ordinance, an Ordinance for constituting Wireless Telegraphy a monopoly of Government, the Sudan non-Mahommedan Marriage Ordinance, which incidentally recognises the validity of marriages contracted under, or in accordance with, any valid Pagan law or custom, the Omdurman Lands Proclamation, and many other Ordinances, amongst which special mention should be made of the Egyptian Judgments Ordinance of 1901, enacting that judgments of the Egyptian Native Tribunals and of the Egyptian Religious Courts, shall be recognised and enforced in the Sudan.

By this last-mentioned Ordinance the Sudan has shown its progressive policy in giving its adhesion to the principle that there should be a more wide and mutual recognition of judgments between different countries, whereby the business of the world may gain greater security for its external commerce.

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As to criminal jurisdiction, the Courts constituted under the Sudan Code of Criminal Procedure try all offences arising under the Sudan Penal Code, and all offences under any other laws, subject to any special regulations made in respect of the latter class of offences.

The Code is to take effect also, subject to the exigencies of martial law, wherever, and so far as the same may, for the time being, be in force.

There are five classes of Criminal Courts, namely, Mudirs' Courts, Minor District Courts, and Magistrates' Courts of the first, second, and third class respectively: a Mudir's Court consists of three Magistrates, inclusive of the Mudir himself, or other Magistrate of the first class nominated by him; a Minor District Court also consists of three Magistrates. *Ex officio* a Mamur is a Magistrate of the third class, an Inspector of the second class (but he may be nominated a Magistrate of the first class), and a Mudir is a Magistrate of the first class.

Any military officer, serving or employed in the Sudan, and qualified to sit on Courts martial, may be nominated by the Governor-General a Magistrate for the purpose of constituting Mudirs' Courts, and Minor District Courts. All Magistrates, exercising their functions within any Province, are subordinate to the Mudir of such Province; the Mudir himself being subject to any directions given from time to time by the Governor-General.

Where any person has been sentenced to punishment for an offence, the Governor-General may at any time, without conditions, or upon any conditions, which the person sentenced accepts, suspend the execution of his sentence, or remit the whole or any part of the punishment to which he has been sentenced: the Governor-General may further, without the consent of the person sentenced, commute a sentence of death into any other sentence allowed by law, or a sentence of imprisonment into one of fine.

The Code of Criminal Procedure is worked out in elaborate detail, and contains some novel provisions, including regulations for compounding certain specified offences: for example, adultery with or by a married woman, which is made a penal offence under the Sudan Penal Code, may be compounded by the husband of the woman: the abetment of a compoundable offence may be compounded in like manner.

The First Schedule to the Code of Criminal Procedure sets out a tabular statement of offences, showing by whom, and in what way, process may be issued in respect of each offence, the punishment that may be awarded, and the Court by which such offence is triable: other Schedules define the ordinary powers of magistrates and the limits of offences triable summarily, and, lastly, prescribe forms to be used in the different stages and incidents of criminal procedure.

In the administration of justice generally, both civil and criminal, in the Sudan, as the Judicial Commissioner has reported, no undue stress is laid on the technicalities of procedure, so that at least the reproach of the late Sir George Jessel, that "the use of a technicality is to defeat justice," may not be levelled against the judicial system now being there evolved.

W. R. B. BRISCOE.

V.—CIVIL JUDICIAL STATISTICS, 1907.[1]

IN his Introduction Sir John Macdonell tells us again much the same story as in previous years. There is, as usual, a decline in the proceedings begun in all Courts, mainly attributable to the continued decline in County Court plaints, which has gone on since 1904. There are, however, known increases in the Court of Appeal, the King's Bench Division, and the Borough Courts of Record, of 57, 864, and 526 cases respectively; and the total decline was not large, being 3,189. In proceedings heard and determined the decline was much larger, both actually and in proportion, as it amounted to 6,900, or 460,562 against 467,462. The Editor here calls attention to the

[1] *Judicial Statistics, England and Wales, 1907.* Part II.—Civil Judicial Statistics. London: Wyman & Sons.

fact that during 1907 there was an increase in trials for indictable offences and a decrease in non-indictable offences, but he does not draw any conclusions from this to explain the civil statistics, and the most determined opponent of the House of Lords would hardly contend that the remarkable increase in the number of proceedings begun before that august tribunal explains the increase in the number of indictable offences tried in the same year.

One always looks with special interest on the records of the Privy Council. In 1907 there was a marked decline in the number of appeals entered—75 against 99; about half of these were from India. Besides the appeals entered, there were a considerable number of petitions for special leave to appeal, mostly from Canada and Australia, of which only 18 out of 50 were granted. One important feature of legal proceedings—the taxed costs—are shown by the table given in the introduction to have averaged £249 in the 68 appeals in which costs were taxed. A feature worth noticing is the high proportion of reversals. Of the appeals heard and determined, in 43 the judgment was affirmed, in 32 reversed, and in 3 varied. Of the appeals from Colonial Courts alone, the numbers affirmed and reversed were exactly equal, being 16 each, and 2 were varied. One appeal from the Consular Court of China and Corea was entered during the year, and 2 were heard and determined, in both which cases judgment was reversed. There was no appeal from the Channel Islands or from Ecclesiastical Courts. There has been no appeal from an Ecclesiastical Court in England since 1903.

There has been a remarkable increase in the business of the House of Lords—93 petitions of appeal were presented as against 53 in the previous year. This is the largest number since 1902, when 96 petitions were presented, and, with that exception, is the highest given in the comparative table for the years 1888—1907. 73 cases were finally

adjudicated on—in 48 the judgment was affirmed, and in 25 reversed. The average amount allowed for taxed costs was £441. In consequence of this increase of business the House sat for judicial business 110 days, as against 70 in 1906. There were only two Peerage claims, of these one was admitted and the other is pending.

In the Court of Appeal there was a slight increase in all appeals set down, from 636 to 693. The largest number of appeals came from the King's Bench Division, which number 181 from final and 193 from interlocutory orders, as against 150 and 33 respectively from the Chancery Division. It is worth noting the comparative results of the appeals from these two Divisions, as out of all the King's Bench Division appeals 219 were affirmed and 139 reversed, while in the appeals from the Chancery Division 89 were affirmed to 42 reversed. The Court of Appeal also sat more days than in 1906, the numbers being 466 against 398. This is mainly attributable to the sitting of a third Court on 53 days.

There is but little change to be remarked in the proceedings of the Chancery Division, for though fewer writs of summons were issued, there was a small increase in total originating proceedings. There was a decrease in the orders made in Chambers and District Registries, but an increase in motions set down and heard, and actions set down. The number of actions heard and determined was, curiously enough, exactly the same as in 1906, namely, 475. In all other respects there seems to be a falling off. The number of actions tried per judge has sunk as low as 75·2. For 1898 it was 124·8; but an additional judge was appointed the next year, and the number has never quite reached that figure again.

The King's Bench Division shows an increase under several headings. The number of writs issued was 66,481 as against 65,699. What amount of real business these writs indicate

can be conjectured from the facts that there were 19,644 judgments entered for plaintiff in default of appearance, and 6,670 summary judgments under Order XIV. There has also been an increase in summonses, orders, and cases in the commercial list. More actions have been entered for trial, and more have been tried and disposed of in Court, the latter figures being 2,086 against 1,914.

The Official Referees tried more cases, sat more days, got more fees, and the amount of their awards was no less than £260,296, as compared with the £54,551 of the previous year. But in spite of all this, civil business has been for some years on the decline. This is particularly noticeable in the Circuit figures, and it has been pointed out by Sir John Macdonell year after year. In 1907 only 773 cases were entered and 580 tried on circuit—the lowest figure that has been reached. The Editor gives a table of 26 assize towns in which 5 actions or fewer were entered. In nine of these no action was entered during 1907. The only business on Circuit which shows any increase is in trials for indictable offences.

The number of judgments entered in the King's Bench Division was 29,737; of these only 735 were after trial by jury, and a few more, or 761, after trial without a jury. Although these numbers are very similar, there is a great difference in the amount for which judgments on money claims were entered under these two headings respectively. £170,000 was after trial by jury and no less than £1,121,000 after trial without a jury. The total amount for which judgments on money claims was entered was £6,758,876, as against £5,593,635 in 1906.

In the Probate, Divorce, and Admiralty Division there is a slight decrease in the petitions for divorce and a slight increase in those for judicial separation. Nearly 60 fewer suits were tried and over 40 fewer decrees granted. The King's Proctor intervened in 31 cases and was successful in each.

The usual interesting tables of duration of marriage and personal conditions of parties in matrimonial suits is given. Last year we were able to congratulate the profession on only one barrister figuring in the table of husbands' occupations at date of marriage for 1906, but in 1907 we regret to notice the number rose to 6; solicitors increased from 10 to 11, but clerks fell from 5 to 1. It is rather interesting to notice the figures in the different classes of occupations, although comparison is impossible without knowing the numbers who practise each occupation. Farmers fell from 18 to 12, and mine-owners and managers (a small but evidently a happy and virtuous class) from 1 to 0. Manufacturers also decreased from 195 to 162. Those engaged in navigation and fishing increased a little, from 21 to 24. Those engaged in inland transport increased from 25 to 35, mainly from the figures for railwaymen rising from 2 to 13, in spite of that for the Post Office falling from 8 to 1. Trades rose from 317 to 327, and professional men from 230 to 246. The class most fully represented seems to be that of engineers, architects, &c. It would have been interesting if a table of the occupations of the co-respondents had been added.

Although more bankruptcy notices were issued than in 1906, there were nearly 300 fewer petitions filed and receiving orders made. These estimated liabilities were nearly £100,000 less and the assets about £30,000 more. 108 companies were ordered to be wound up under the Companies (Winding Up) Act 1890, a number 7 fewer than the previous year. The nominal capital, however, of these companies was over £400,000 more, and the amount paid up was about £36,000 more; but it is worth noting the different proportions allotted to vendors and to the public in the companies wound up in the two years. In 1906 the amount allotted to vendors was £1,463,624, and to the public £519,898, while for 1907 the figures are £968,667

and £979,002. The difference may perhaps be partially accounted for by 1,001 founders' shares appearing in 1906 and only 60 in 1907. The gross value of the property admitted to probate was £274,251,000 as against £286,891,000 in 1906. The total values were £241,127,000 and £259,760, but the total death duties paid were £16,571,000 against £16,500,000.

The decrease in proceedings in the County Courts continued. They seem to have reached their *maximum* in 1904 and have declined ever since, and this too in spite of the extension of jurisdiction under the Act of 1903, which certainly seems to have caused an increase in the number of plaints above £50. The number of plaints above £50 and not exceeding £100 has increased, and is 2,758 against 2,493; but those above £100 have diminished from 961 to 724. There is a slight diminution in equity petitions, etc., a slight increase in actions remitted from the High Court, and a more substantial increase of over 4,000 in other proceedings. The average amount per plaint has fallen from £3 : 1s. to £3 : 0s. 10d. The percentage of actions tried with a jury has slightly increased. The aggregate amount recovered has diminished a little, but costs have increased. The amount of fees roughly equals a quarter of the amount recovered, and we have heard it more than once alleged that the falling off in County Court business is to be attributed to the heavy Court fees charged.

Perhaps the most remarkable feature in the figures dealing with the County Courts is the large increase in proceedings under the Workmen's Compensation Acts. The number of arbitrations has risen from 2,532 to 3,330, and the memoranda registered from 5,171 to no less than 9,349. Under these circumstances it is not surprising the compensation has also risen from £223,054 to £290,760 lump sums, and from £1,756 to £2,766 weekly payments.

It is satisfactory to note that there is a diminution in the number of warrants of commitment issued, and that the number of debtors imprisoned has fallen from 12,014 to 9,325. This is probably the result of the discussion and inquiry there has been on this subject. On looking at the business of the individual Courts we still find Birmingham, with its estimated population of 749,000, has had more than 66,000 plaints entered, 22,700 actions heard, and 709 debtors imprisoned. Leeds comes next with 34,800 plaints to 461,792 inhabitants, and 342 debtors imprisoned. Manchester and Liverpool have only about 24,000 and 26,000 plaints respectively, and 78 and 28 debtors imprisoned. It must, however, be borne in mind that these figures are partly explained by both Manchester and Liverpool having local Courts, besides the County Courts, in which a considerable number of actions for small amounts are brought. The Mayor's Court, London, about holds its own, and shows a slight increase in business.

We must conclude our notice of these statistics by referring our readers to Sir John Macdonell's able introduction, and mentioning that the number of jurors summoned during 1907 was a little over 75,000, and that the net charge of service for the Court of Appeal and the High Court of Justice in bankruptcy and companies winding up and in County Courts is about £290,000, pretty evenly divided between the Superior Courts and the County Courts.

VI.—CURRENT NOTES ON INTERNATIONAL LAW.

The Balkan Settlement.

WOULD it, a year ago, have occurred to anyone in England to treat of the future of Austria on any hypothesis but that of early disruption? M. Emil Reich tried

to instil truer views into the public mind, but his preaching was regarded as the patriotic perverseness of a wilful paradoxist. At this moment does anybody think of Austria as on the verge of dissolution? A more striking change of outlook was never seen. In fact, Austria counts, and has always counted, for much. She is the depositary of the German tradition. Nothing is more notable in Austria to the stranger than the thorough Germanism of the population from Troppau to the Tyrol. The long quarrel of Brandenburg with Austria was in essence religious. The Catholic elector Albert was the dutiful henchman of the Emperor Frederic III. Now that four centuries have passed and the ardours of religious conflict have abated, there is nothing to keep Prussia and Austria apart. Their common German culture irresistibly draws them together. Instead of splitting up, the Austrian Empire, deriving inspiration from the Germanic, has awakened to new life, and is at the moment the foremost factor in European politics. No doubt the eclipse of Russia, due to her dramatic defeat by Japan, is in some measure responsible for this. As it provided the Norwegian politicians an opportunity of breaking loose from the Union with Sweden, so it gave Austria an opportunity of pushing her way in the Balkans. It was an opportunity which it was necessary to seize at once: for no-one can say what may follow from the regeneration of Turkey. A Mohammedan Lepanto is not beyond the range of calculation in the near future, singular as is the present Turkish situation. At the same time, the moderation with which Austria acted is very remarkable. The English journals have uttered a mournful lament on the instability of treaties and the decay of national probity which her recent action throws into relief: but such threnodies are entirely out of place. Austria was the undisputed mistress of Bosnia and Herzegovina before the annexation: she is no more so now. Less so, in practical fact; for the provinces will doubtless receive

a constitutional organization as integral portions of the Empire. All that has happened is that a shadowy reversion residing in the Sultan disappears into the inane—its proper home. Bosnia and Herzegovina were taken from Turkey by Russia and Europe thirty years ago, and virtually handed over to Austria *sine die*, because Turkey could not be trusted with them. If any Power is prejudiced by the indefinite and unlimited occupation by Austria being turned into a definite permanency, it is Turkey, and Turkey alone. And she has been paid off. It was universally recognised that the Greek Kalends were the only term that could be set to the duration of Austrian rule in these districts. The Austrian declaration merely says in plain language what everyone knew to be the fact.

The real *gravamen* of the charge is not the technical, and condoned, injury done to Turkey; but the check placed upon Servian and Slav aspirations. These are not legal rights. No treaty secured to Servia any pre-emption over Bosnia. Any injury that her pretensions have sustained furnishes no ground for solemn dirges on the fate of treaty stipulations. "But the Treaty of Berlin was a joint arrangement, entered into by several Powers: two of them cannot alter its provisions without the consent of the rest!" So far as the interests of the rest are directly affected, that is true. But there is not in the Treaty of Berlin any sacrosanct finality which prevents private bargains from being made by the parties in cases which primarily affect themselves alone. The provision by which Austria was admitted into Bosnia on terms falling short of sovereignty was so framed and limited in the interests of Ottoman *amour propre*, and of that alone. If it had been meant to leave open a door for Slav aspirations, or if it had been calculated for the benefit of Russia, it would have taken a very much more definite and certain form than the vaguely sentimental

one which it did. The repudiation by Russia in 1870 of the Black Sea clauses of the Treaty of Paris stands in a totally different category. That was a clear breach of a provision avowedly entered into for the benefit of Britain and France. No arrangement between Russia and Turkey could alter it. But the abolition of a sentimental sovereignty, conceded thirty years ago as a salve to Turkish susceptibilities, concerns no-one but Turkey herself.

In fact, when once Eastern Roumelia was allowed to separate from Turkey and to join Bulgaria, without active opposition by the Powers, the dubious principle of the sanctity of the *status quo* was practically given up. This was an incomparably larger disturbance. Both Turkey and Russia urged that it should not be permitted. Lord Salisbury was foremost in deprecating any interference. It was plainly pointed out by the Russian diplomatists that no Power would thenceforward be able to consider itself aggrieved by the mere fact of the disturbance of the Balkan balance as established by treaty. The events of the past winter have done no more than justify that position. For all that, it would surprise no-one if the persons really injured, *i. e.*, the Turks, should lay up a memorandum of a score to be paid off some day against Austria. They have accepted much-needed cash, now, in ostensible full discharge of their claim. But it is by no means certain that they are satisfied, nor that they will not, at a more propitious time, call upon the Chancery of nations to open the foreclosure. Indeed, the consolidation of a strong and capable Moslem power would have grave consequences far beyond the Balkans. The Turkish flag still floats as a symbol of the Sultan's overlordship in Egypt. The French occupation of Tunis is nominally to continue only until the Mohammedan power is able to maintain order there. Persia, not always on the best of terms with the Porte, is nevertheless more in

sympathy with it than with St. Petersburg or St. James'. Arabia is nominally Turkish. The Persian Gulf is partly Turkish. At Avlôna the Mussulman has a foothold on the Adriatic. The substitution of a vigorous for an effete power in those localities is fraught with striking possibilities, which no-one can afford to disregard.

The Declaration of London.

The result of the deliberations of the small and compact congress, which met in London during the winter, has been to arrive at a far more extensive agreement upon disputed points than was the case at the Hague in 1907. Whether its conclusions will meet with universal acceptance is another question; but the achievement of unanimity on so many points is a striking tribute to the good work accomplished. The Earl of Desart, Mr. Hurst, Mr. Fromageot, and the rest of the assembly, are to be congratulated on an excellent exposition of Prize law, which, if it is by no means perfect, is nevertheless drawn up with lucidity and even with brilliance. Its reception by the great maritime trading powers which do not maintain large navies—Brazil, Argentina, Norway, Sweden, Belgium, Turkey—is now to be looked for with considerable interest. For, though Spain and Holland in a measure represented at the congress the interests of neutral maritime nations, its composition was overwhelmingly belligerent. Critics of the Declaration in the British Parliament have been much embarrassed by the difficulty of making up their minds as to whether they were going to attack it as too favourable to belligerents, or to neutrals. As professed patriots, they preferred the latter course; as opposition tacticians they could not help seeing that far better openings were presented by the former. The result was a half-hearted and inconclusive attack, which was met by a defence which revealed the difficulties which would have beset the Government had

the Declaration been the object of a more coherent assault. In fact, it is not difficult to see that it is really neutral interests which are prejudicially affected by the Declaration. It flatters neutral interests in appearance, while it covertly deprives of all substance the protection which they ostensibly receive.

"Occasional" Contraband.

Apparently a wide protection is accorded to neutral merchants by the restriction of "absolute" contraband to a very narrow class of objects. But with this is coupled for the first time the formal recognition of "occasional" or "conditional" contraband, comprising almost all possible cargoes except certain raw materials. Food, clothing, fuel, and most kinds of machinery, are relegated to this dangerous class. And they may any of them be condemned, if they are going to the enemy's country. True, the Declaration says they may not. But it immediately adds, that it really does not mean what it says. All that it really means (it observes), is that *primâ facie* such cargoes will be free. The captor will be at liberty to bring forward evidence to show that the goods were really meant for belligerent purposes, and condemnation may thereupon proceed if the Prize Court is satisfied. Innocence is "presumed," but the presumption may be rebutted. Further, the ship itself may be condemned, if it is carrying a cargo which, to the extent of one-half, is so regarded as "contraband." It is obvious that, as Woolsey long ago pointed out, this is tantamount to allowing "paper blockades." There is little need to go to the expense and embarrassment of a blockade, if a single cruiser can capture vessels carrying innocent cargo to the enemy, on the condition of furnishing some evidence of probable belligerent use. Even if confiscation were not decreed, costs and damages might be refused by the Court: and the consequent interruption to neutral

trade would be enormous. Theoretically, the clause seems fair enough, with its permission to confiscate only when belligerent use can be shown to be contemplated. In practice, the subjection of a nation's commerce and shipping to the investigation of her rivals is fatal. The uncertainty as to what sort of evidence will be regarded as sufficient to condemn their ships, will be disastrous to neutral merchants. The clause is, in short, a *doctrinaire* clause, drawn up in time of peace by persons who have no experience of a great maritime war. Besides, the old penalty of "occasional" contraband carriage was merely pre-emption. It was taken and paid for. Is it credible, that now confiscation of ship and cargo is proposed?

Continuous voyage.

Neutrals used to be at any rate safe in transit to a neutral port. It is naturally no exception to this principle, that they might not be safe if they were obviously out of their course for it. Again the Declaration is chargeable with irritating ambiguity. It lays down in terms that the destination of the vessel is conclusive. Then it adds a conversational gloss, explaining that it does not mean what it says, and that vessels actually on a straight course for a neutral port can be condemned if the Court is satisfied that their real destination was a hostile one. While one may be in every way grateful for the abolition of the wild doctrine of "continuous voyage" elaborated by ex-governor Chase of Ohio, on his sudden elevation to the Chief Justiceship of the United States, it is nevertheless obvious that its most objectionable feature remains, if the Declaration stands in this respect as framed. If neutral commerce and neutral ports are to be subject to the withering breath of war, through permission being accorded to cruisers to stop neutral ships on a straight course for neutral ports, on the allegation of a probable enemy destination, irreparable injury will be done

to neutral interests. Scanty evidence, even if the impartial Prize Court does not proceed to condemnation, may yet be held to justify the refusal of all indemnification to the owners. And it is quite possible that the Prize Court—whose tendencies and composition are unknown quantities—might imitate the vagaries of Chase, and infer from the character of the cargo, or the antecedents of the consignees, that the destination was not what it purported to be. Suppose a steamer coming up the English Channel with railway sleepers for Hull. It is known that at Kiel there is a pressing need of railway plant. Is it probable that a State at war with Germany would hesitate to seize the vessel, under the new rule, and trust to the leniency of the international Court?

Destruction of Neutral Prizes.

It is really remarkable that there does not appear to be any record, in any naval war, of neutral ships being destroyed on the high seas. The more may it be regretted that a right to destroy such ships as the belligerent cares to pay for, should now have been admitted. The permission rests on an implied assumption that a cash payment is, as Lord Bowen said "costs" were, a panacea for everything. On the contrary, the violent sinking of a merchant vessel, with the incalculable hardships incurred by her people, is not a thing to be measured in damages. There is the loss of personal effects: things which have a sentimental, a speculative, or a special value (such as papers, manuscripts, pictures, dogs, documents), and for the loss of which no Court will give damages satisfactory to the owner. There is the danger of injury to health, especially in the case of passengers; and it may be impossible to prove it in a convincing way. There is the impossibility, for private persons, of pursuing their claims adequately, and of presenting them forcibly, before foreign

and strange tribunals. It is greatly to be deprecated that it should be permitted to a belligerent, on any pretext, to assume a jurisdiction over a stranger on the high seas, to the extent of working such irreparable damage. Double damages would hardly be a satisfaction. The severely limited damages of strict legality are in no sense such.

Neutral Insecurity.

Never before have nations generally submitted to the doctrine that innocent goods may be contraband. Never before have they seen cruisers destroying their ships at sea, on the terms of paying for them. Never before have nations admitted that their commerce with neutral ports can be interrupted. Never before have they allowed their ships to be captured for conveyance of "conditional" contraband. It may be asked, what could be done, in view of the Russian views maintained in the recent war. Such a question implies that any extravagant claim must necessarily be admitted in whole or part. The Russian pretension to exercise authority over neutrals on the high seas was unsupported by a vestige of historical foundation. The United States' doctrine of apparent destination had been assailed by almost every British writer and by many Continental ones. The confiscation, without payment, of innocent cargo as "occasional" contraband, is an absolute novelty. It seems to us to establish the worst possible precedent, to admit that all the strange doctrines which may be put forward are sound, and only require to be appropriately regulated. It is an elegant mode of surrender for the present and an evil augury for the future.

Text and Comment.

The somewhat unusual course has been adopted, in the Declaration, of accompanying the instrument with an expanded official comment, the precise authority of which it is

difficult to determine. We are told that the Continental practice would be to regard such an exposition as equally authoritative with the principal instrument. In that case, it is hard for persons accustomed to English ways to appreciate the reason for not definitely incorporating its provisions with it. If, on the other hand, the language of the comment, though entitled to equal respect with the Declaration, is subject to a greater laxity of interpretation, it is easy to see that a very disturbing element is introduced into the study of the subject. Instead of a clear-cut rule, we are presented with a rule qualified by a conversational explanation, the precise meaning of which may be the occasion of endless disputes. Then, besides the disc and the shadow thus created, there is the penumbra of the British delegates' report: which is clearly not a binding statement, but which, as obviously, will be founded upon as a guide to interpretation in cases of difficulty. We have referred to various cases in which the gloss puts an entirely different complexion on the text.

Costs and Damages.

Every practising lawyer is familiar with the transcendent importance of costs. It is not so important that justice should be ideal, as that it should be cheap. A litigant may win his case, but he may find his verdict swallowed up by costs. A claim good in law, but dubious in morals, may be rendered nugatory by the certainty that the plaintiff would be deprived of costs. That is why it is so exceedingly important that in prize cases, where the ascertainment of facts must always be most difficult and expensive, on account of the distance of the tribunal and the differences of language and ideas, only the plainest and simplest circumstances should be capable of grounding condemnation. The ship must be condemned "out of her own mouth," as the old civilians expressed it. It must be a plain and obvious

case. To enter on a careful balancing of conflicting statements, after the fashion of a municipal tribunal, is foreign to the nature of a Prize Court. The costs and expenses of establishing innocence in each case would be such that a very serious hardship would be imposed upon neutral shipping by the mere liability to an investigation on the ordinary lines of a Common law trial. That is the reason of the apparent narrowness of the old rules empowering condemnation. It might be theoretically proper that ships and cargo should be liable to confiscation in many other events. But, as practical men, the old lawyers remembered the governing question of costs. It profited a merchant little to have his venture back, if he had to spend a fortune in defending it.

The novel doctrine of our day, untested by war, abandons that idea. It takes a high, *doctrinaire* ground, divorced from mundane considerations. It takes no account of difficulties of proof, and assumes that all questions of fact are equally capable of being solved by any impartial tribunal. The expense is, in the eyes of its advocates, a secondary matter. A vessel which has been carrying the most innocent cargo, may be captured for having a little contraband amongst it. This contraband may be mere "conditional" contraband—corn or flour, or wire or buttons—which the Court, in its wisdom, thinks were intended for belligerent use. The ship must be eventually released; but, by Art. 41, the Court has no option but to force it to pay all the captor's costs. Under the old law of pre-emption, the ship would even have received freight from the captors in such circumstances: so that a revolutionary change is here effected.

Nationality of the Flag.

A very simple and sensible course has been taken by the framers of the Declaration, in providing that the nationality

of a ship shall be determined by the flag which she is entitled to fly. If a nation chooses to adopt a vessel into its service, and so far to be responsible for its conduct, it is plainly unnecessary to probe the matter further—apart from fraudulent transfers. Yet this apparently conclusive principle has not always been recognised. The school of writers for whom the connection of a ship with a particular State is a mere matter of the ownership of the plates and rivets, have declined to see in the ship's certificate any derogation from the eminent rights of the country of which the owner is a subject. They were inclined to refuse to recognize the right which such States as Colombia claim, of matriculating the property of a foreign owner into the national marine. There can be no further question of the matter in future (Art. 57). The question of fraudulent transfer on the eve of hostilities, or during their progress, is naturally a different affair, to be regulated by independent principles.

Hamlyn v. Talisker Distillery.

In *Johannesburg* v. *Stewart & Co.* ([1909], 1 Sc. L. T. 180) Lord Mackenzie furnishes another instance of a somewhat exaggerated regard for *Hamlyn* v. *Talisker Distillery*. It will be remembered that, in the latter case, it was held by the House of Lords that in a contract involving both Scottish and English elements, the conclusion to be drawn was that (looking particularly to an arbitration clause fixing a London arbitration) English law was intended to apply. An arbitration clause was therefore held good which by Scottish law would have been bad. This was somewhat of a *petitio principii*. It is plainly impossible to argue as a general rule, that because the parties have agreed to a provision which would be bad by the law of A., they must therefore have intended to contract according to the law of B. Still less is it possible always to argue that they can escape the law properly applicable to their contract, by choosing one

which enables them to do what the proper law would not. However, in *the Hamlyn Case*, the choice between Scottish and English law was so fairly balanced that the decision was probably right on the facts. In *Robertson* v. *Brandes, Schönwald & Co.* (8 Fraser, 815: *cf.* L. M. & R., Aug. 1907), the Court, ostensibly founding on *Hamlyn*, went much further. To a contract which contained only Scottish and Belgian substantial elements, they applied English law, merely because of a clause providing for a London arbitration. In the *Johannesburg Case*, the same result was arrived at. The contract was for the execution of works by a Scotch firm in the Transvaal. It was, however, in English form, was executed in England, and provided for an arbitration under the English procedure. The parties had further provided that their contract should be "an English contract, determinable in the English Courts." Lord Mackenzie held that this did not exclude the Scottish Court's jurisdiction: and, considering the domicile of defenders, he did not think that the *forum* was *non conveniens*. But on the authority of *Hamlyn* and *Robertson*, he held that the English law applied: and he sisted the action to enable arbitration proceedings, if competent, to be taken in England.

As in *Robertson*, therefore, the neat point was raised, whether parties, at their own hand, can adopt for the construction and governance of their contract, the law of any third country they please, and so evade the provisions of their own law. *Hamlyn* did not decide anything so extreme. At the same time, the *Johannesburg Case* is capable of being supported as an instance of *locus regit actum*. The contract was executed in England.

The Laws of War.

We are glad to receive from Professor Holland an emphatic assurance that, in his valuable book *The Laws of War on Land*, reviewed in our February number, p. 241, there

is nothing to suggest any doubt as to the duty of giving quarter. At page 43, he observes:—"It is especially pro-"hibited— . . . . . (c) To wound or kill an enemy who, "having laid down his arms, or having no longer means of "defence, has surrendered at discretion." He proceeds— "It may be a question up to what moment acts of violence "may be continued without disentitling the doer to be "ultimately admitted to the benefit of quarter under this "clause." This qualification, he explains,—"has, of course, "reference only to the question of fact, whether or no a "surrender may be considered as fraudulent if an enemy "has continued to fire under cover of a white flag or other "indication of non-belligerency." This makes it clear that Professor Holland by no means intends to imply that quarter may be refused to a soldier who fires up to the last moment before surrendering—as at first sight his words suggest. Professor Holland also thinks that our reviewer imputed to him an approval of the doctrine of von Moltkë and the writers on *Kriegsraison*. It was rather upon the absence of any strong reprobation of that doctrine that the criticism appears to have been based.

T. B.

VII.—NOTES ON RECENT CASES (ENGLISH).

THE rule that in construing a will the Court will not permit a clear and unequivocal gift to be altered or cut down by subsequent words unless they are equally clear and unequivocal, is well illustrated by *Hordern* v. *Hordern* (L. R. [1909], A. C. 210). There a testator, who had two sons and several daughters, by his will gave each daughter a fixed charge on his estate, and his wife an annuity till death or re-marriage; and directed that the residue of his estate should be divided equally between his two sons on his youngest child attaining twenty-one.

By a codicil he gave his trustee a discretionary power at any time to increase the wife's annuity and made a gift over of the residue to his brother in case all his children died without issue. Clearly, full effect could not be given to this provision unless the division of the residue between the sons was postponed until the widow died or re-married and one of the children died leaving issue. The Court held that this construction could not be put upon the words—that the provision must be held to apply only to the period before the date on which the will directed the residue to be distributed, namely, the period before the youngest child attained twenty-one.

Chapman v. *Michaelson*, decided by Eve, J. (L. R. [1908], 2 Ch. 612), has now been affirmed by the Court of Appeal (L. R. [1909], 1 Ch. 239). The question arose out of a mortgage void under sect. 2 of the Money-lenders Act 1900. The trustee of the borrower applied for a declaration that the mortgage was void without asking for any other relief. The money-lender claimed that the relief sought was equitable, and that consequently the maxim "he who seeks equity must do equity" applied, and the plaintiff was therefore not entitled to the declaration unless on the terms that he returned the money that had been advanced on the mortgage. If the relief sought was equitable, there is no doubt the money-lender's contention was correct (*Lodge* v. *National Union Investment Co.* (L. R. [1907], 1 Ch. 300). And there is equally no doubt that declarations of rights were originally granted solely in the Court of Chancery. But equity granted them only as ancillary to other relief; while by Order XXV, r. 5, the High Court is authorised to grant them without granting consequential relief. This the Court of Appeal held made the remedy a new one, unknown to equity. It is respectfully submitted that it would be more correct to say that declarations are now

freed from a restriction equity imposed on their issue. If that is so, they remain equitable remedies still, and there is nothing to show that it was intended they should not be subject to the ordinary rule as to equitable remedies.

By sect. 25 (8) of the Judicature Act 1873 the issue of interlocutory injunctions was also granted to the High Court, and was also relieved from certain restrictions imposed by equity. Injunctions are now to issue simply where "it shall appear to the Court to be just or convenient that such order should be made." But nevertheless, it has been held that this in no way alters the principles on which injunctions are to be issued (*Day* v. *Brownrigg*, L. R., 10 Ch. D., at p. 307).

The rule—which by sect. 24 of the Wills Act 1837 was extended to devises—that as respects property comprised in a will, the will is to speak from the death of the testator, was no doubt intended mainly to avert, what the law has always regarded as a calamity, the possibility of the partial intestacy of the testator. It may, however, be doubted whether in averting this, the rule has not created a greater evil by constantly defeating the obvious intention of the testator. In order to prevent this, in the case of a specific devise, the Court of Appeal had in *In re Portal and Lamb* (L. R., 30 Ch. D. 50), to read "all my land" in a certain parish, as referring to about a fourth part of the land which the testator at his death owned there. In *In re Slater* (L. R. [1907], 1 Ch. 665), a bequest of shares was altogether defeated because subsequently to the will, through the amalgamation of the company with others, there was nothing to answer the description at the testator's death, though the testator himself had in no way interfered with the investment. Strange to say, according to *In re Jameson, King* v. *Winn* (L. R. [1908], 2 Ch. 111), if the amalgamation

had taken place *before* the will was made, and the testator by his own carelessness had used the same words, the legacy would have been perfectly good and the misdescription held to be merely *falsa demonstratio*. And now in *In re Gillins, Inglis* v. *Gillins* (L. R. [1909], 1 Ch. 345), the same rule has operated to cut down a legacy to just one-fifth of what the testator obviously intended it to be. There the testator gave "25 shares" in a company to W. The shares were then £50. After the execution of the will they were split up into £10 shares. Held that the legatee was entitled only to twenty-five £10 shares.

When does a covenant in a lease "touch or concern the thing demised" so as to make it run with the land? Can a covenant not to do something on land not demised touch and concern the land demised? *Primâ facie* one would say, No. But this is not the answer of the law. If such a covenant affects the land demised "as regards mode of occupation or is such as *per se*, and not merely from collateral circumstances, affects the value of the land," it touches and concerns the land (per Bayley, J., in *Congleton Corporation* v. *Pattison*, 10 East 130, at p. 135). So accordingly, a covenant by a lessor not to build on land adjoining the land demised beyond the fixed building line, directly affects the value of the land demised, and so can be enforced by an action for damages at Common law, not merely by the original lessee but by his assignee (*Ricketts* v. *Enfield Churchwardens*, L. R. [1909], 1 Ch. 544). But note that this does not mean that the burden of the covenant runs with the adjoining land and so gives the lessee an action against the assignee of it. For example, a covenant may run with the land on a grant in fee simple; but the burden of it cannot at law run with regard to the land retained by the grantor. That is the reason why equity was forced to invent the doctrine of *Tulk* v. *Moxhay* (2 Ph. 774).

The following points are worth noting: In family settlements "eldest son" means "eldest son" at the time the portions are paid to the younger sons (*In re Stawell's Trusts*, L. R. [1909], 1 Ch. 534). A contract of sale with a condition that the purchase-money or a portion of it will be retained on a mortgage of the purchased land is not a contract for a loan so as not to be specifically enforceable (*Starkey* v. *Barton*, L. R. [1909], 1 Ch. 284). Investment of trust money on the security of unfinished houses is not necessarily of such a speculative character as to amount *ipso facto* to a breach of trust (*Shaw* v. *Cates*, L. R. [1909], 1 Ch. 389). The rule in *Ryland* v. *Fletcher* (L. R., 3 H. L. 330) does not extend to render an owner of land liable for the damage done by the escape of a dangerous thing brought upon it by another person for his own purposes (*Whitmore's (Edenbridge), Limited* v. *Stanford*, L. R. [1909], 1 Ch. 427).

J. A. S.

In *Flureau* v. *Thornhill* ([1775], 2 W. Bl. 1078), De Grey, C.J., said, "Upon a contract for a purchase, if the title proves bad and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." But this was not very decisive upon what was a very important question. And in *Bain* v. *Fothergill* (L. R. [1874], 7 H. L. 158), Lord Chelmsford proposed the question in a somewhat more precise form for the consideration of the judges. The decision finally come to was, that in such circumstances a proposing purchaser of real estate was not entitled to recover compensation in damages for the loss of his bargain. This principle was applied in *Morgan* v. *Russell & Sons* (L. R. [1909], 1 Q. B. 357), where the plaintiff, the respondent here, the lessee of land on which a quantity of slag had been deposited many

years before, contracted to let the defendants remove and retain the slag; but was prevented by the lessor from completing his bargain on the ground, which the County Court judge from whom this was an appeal supported, that the slag had become part of the soil. This finding of fact was, of course, binding on the Divisional Court, who held that notwithstanding that "goods" by sect. 62 (1) of the Sale of Goods Act 1893, include "things attached to or forming part of the land which are agreed to be severed under the contract of sale," the present contract was one for the sale of land, and that therefore the respondent was not liable for damages under sect. 51 (1) of the Act, or under *Bain* v. *Fothergill*, as it was defect of title which prevented completion of the contract.

According to *Premier Industrial Bank Limited* v. *Carlton Manufacturing Company and Crabtree Limited* (L. R. [1909], 1 K. B. 106), bills of exchange accepted or indorsed on behalf of a company formed under the Joint Stock Acts, are exceptions to the principle stated in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (L. R. [1895], 1 Ch. 629), and in *Biggerstaff* v. *Rowatt's Wharf Limited* (L. R. [1896], 2 Ch. 93), to the effect that when a company has power under its Acts or Articles to execute by its directors certain securities in a certain form, a person who takes such securities which fulfil the conditions set out in the company's public documents is protected in assuming that the directors have properly exercised the power. The decision does not excise from the principle any other securities than bills of exchange; but sect. 47 of the Companies Act 1862 says that a bill is to be deemed to have been properly accepted if accepted in the name of the company by any person acting under the authority of the company. In this case by the articles of association of one of the defendant companies, it would

have been possible for a single director to have authority to accept bills on its behalf, but the board by a minute, which of course was beyond the knowledge of anyone outside the company, required the countersignature of the secretary. The bill in dispute, which was in fraud of the company, was not so countersigned, and the company were by the decision relieved from liability. The decision may be sound, but it will cause some delays in commercial transactions.

Hertfordshire County Council v. *Great Eastern Railway* (L. R. [1909], 1 K. B. 368) is a very satisfactory decision, that where a railway, authorised to cross a high road on the level, lays its rails somewhat higher than the level, it is bound by Common law, unless exempted by its special Act, to maintain inclined planes on the road on both sides of the crossing.

By the Inebriates Act 1868, s. 1, an habitual drunkard who under the influence of drink commits an offence punishable by imprisonment or penal servitude may on conviction be ordered, in addition to or in substitution for any other sentence, to be detained in an inebriate reformatory for three years. By sect. 2, such a person who is guilty of disorderly behaviour on a highway, and who in addition has been summarily convicted of the like offence within the preceding twelve months, may be ordered the like detention. In *Rex* v. *Briggs* (L. R. [1909], 1 K. B. 381) the prisoner, who had come within the provisions of sect. 2, was sentenced to imprisonment with hard labour for the final offence, and to detention for three years as well. But the Court of Criminal Appeal held that as the terms of the first section "in addition to or in substitution for any other sentence" are not included in the second section, he was wrongly sentenced to hard labour. But as he had performed the labour and gone into safe retreat long before the appeal

was heard, it is to be hoped that he may find full consolation in the regretful sympathy and the counsel of resignation of the Lord Chief Justice, "We cannot restore to him anything which he has lost by having to do hard labour; but, at any rate, if he has suffered he must bear that slight inconvenience."

In *Chasemore* v. *Turner* (L. R. [1875], 10 Q. B. 500) Coleridge, C. J., who differed from his colleagues, said, "This case is an instance of the truth of what Alderson, B., said in *Hart* v. *Prendergast* (14 M. & W.), that different minds come to different conclusions of fact in the same document." The truth is further illustrated in *Cooper* v. *Kendall* (L. R. [1909], 1 K. B. 405), in which the Court of Appeal, largely on the strength of *Chasemore* v. *Turner*, reversed the decision of Darling, J., which was founded entirely on the same case. A question of what form of acknowledgment will create a new cause of action on a statute-barred debt—as the question was here—is of course particularly open to individual construction, if the acknowledgment is modified by the expression of hopes more or less like conditions. Buckley, L. J., says the acknowledgment must be "one from which the law infers a promise." This no doubt is conclusive when the acknowledgment is absolute and unconditional. But when it is not, the *dictum* might be once more safely stated, as when the majority of the Court infer a promise.

"The diversity in the views expressed in the judgments" in *Moore* v. *Manchester Liners Limited* (L. R. [1909], 1 K. B. 417), and the cases cited therein, has led Moulton, L. J., to hope that an opportunity may be given for review by a higher authority. But the weight of authority at present does not support the view which the Lord Justice himsel takes, that an accident, happening to a sailor whilst using

the appliance provided for getting on board on his return, after an absence on shore for his own affairs, arises out of or in course of his employment as fully as if he had, in fact, set foot on the ship itself. And the opinion which his lordship seems to hold, that a ladder from a wharf to the higher level of the ship's deck, and so connected as to rise and fall without displacement by the tide, is a "perilous means of access," will perhaps not meet with complete acceptance afloat.

It is very seldom that the House of Lords dismiss an appeal with no more than the curt necessary formal words; but they have done so in *Refuge Assurance Co. Limited* v. *Kettlewell*, which was noted in our issue of August 1907 (No. 345, Vol. XXXII, page 483), when the case had been before the Divisional Court. The short facts of it are, that a woman who had effected an insurance with the appellant company wished, from stress of poverty, to terminate it at the end of a year, but was induced to continue it for four years further by the promise made by two itinerant agents of the company that, at the end of that time, she would be given an absolute policy without further payment. The appellants repudiated the promise of their agents, and the respondent sought a remedy in the County Court, the learned judge of which ordered the return to her of all the premiums she had paid. The assurance company persistently appealed, with the final result thus stated in *Weekly Notes* for 13th March 1909, page 64, and 25 T. L. R. 395: "Lord Loreburn, L.C., moved the dismissal of the appeal without a word more, the appeal being manifestly naught." No more eloquent condemnation of the company could be expressed. The decision of the learned County Court judge of Louth has thus been supported unanimously by every Court in the kingdom to which it could be submitted.

T. J. B.

SCOTCH CASES.

The large number of recent Scottish cases depending upon the interpretation of "charitable purpose," as affecting the validity of a testamentary settlement, is perhaps due to the inability of the Scottish testator to recognise restrictions to which, until recently, Scottish law was little accustomed. On the other hand, the severe restrictions under the law of England placed upon the powers of a testator to delegate to trustees any power of choice in the objects of his bounty, have encouraged numerous attacks upon the validity of trust settlements in Scotland which, as the results have shown, were totally uncalled for. Some of these cases we commented on in earlier numbers of this volume (*ante*, pp. 102, 223), and to these there must now be added the case of *Paterson's Trustees* v. *Paterson* (46 S. L. R. 406). The last-mentioned case scarcely differed from that of *Hay's Trustees* v. *Baillie* ([1908], S. C. 1224), already noted (*ante*, p. 103), in which it will be remembered the objects to be benefited were such "societies or institutions of a *benevolent or charitable* nature" as the trustees might think proper. In the case of *Paterson's Trustees,* now under notice, the residue of the estate was directed to be divided "among such *charities or benevolent or beneficent* institutions" as the trustees in their sole discretion should think proper. The addition of the word "beneficent" was held to be merely exegetical of the earlier words, and therefore, as in the case of *Hay's Trustees,* the suggestion that the will was void from uncertainty was negatived.

A tendency has recently been exhibited to introduce into the Scottish law of contract, the English term "condition precedent." This is rather to be deprecated, for without a certain degree of familiarity with the historical development

and present associations of the expression in English law, its use in Scotland may lead to uncertainty and possibly to confusion. It is true that the phrase was employed long ago by Professor Bell in his *Principles*, where in dealing with "postestative, casual, or mixed" conditions, he incidentally says:—"The conditions may be precedent or subsequent, which nearly corresponds with the condition suspensive or resolutive" (sect. 50). It is in the "*nearly*" that the chief danger lies, for there are subtle distinctions which cannot easily be grasped by the ordinary practical lawyer. In the case of *Wade* v. *Waldon*, decided by the First Division on 3rd February (46 S. L. R. 359), the expression is frequently made use of, but chiefly in citations from English judgments. The case related to a breach of contract by a music-hall artiste, which in the opinion of the other contracting party justified the total rescission of the contract. The Court held that though there was an undoubted breach of a stipulation of the contract which would entitle the other party to damages, the stipulation referred to was not of the essence of the contract, and did not justify the other party in declaring the whole contract at an end. The Lord President and Lord M'Laren who gave the leading opinions were successful in formulating this judgment without the use of the term "condition precedent." The Lord President (Lord Dunedin), said:—"It is familiar law and quite well settled by decision, that in any contract which contains multifarious stipulations there are some which go so to the root of the contract that a breach of those stipulations entitles the party pleading the breach to declare that the contract is at an end. There are others which do not go to the root of the contract, but which are part of the contract, and which would give rise, if broken, to an action of damages." To the same effect Lord M'Laren said:— 'It is not the law, and it would be very unworkable if it were the law, that every breach of contract, however trifling,

would entitle the other party to bring the contract to an end, and to get out of his bargain. The question always is, whether a stipulation which has been broken is of the essence of the contract?"

The difficulties arising from the use in Scotland of the term "condition precedent" are best seen in connection with the sale of goods and the adaptation to Scotland of the Sale of Goods Act 1893. Scottish law was familiar with conditional contracts and with conditions in contracts which by the way are entirely different matters. But it knew nothing of conditions precedent as opposed to "warranties" in sale. The English condition precedent as applied to sale was generally spoken of simply as a "condition," and corresponded to the Scottish use of the word when applied to stipulations in a constituted contract, which were so material as to entitle one of the parties to declare a breach by the other to be, in the option of the party not in breach, a rescission of the whole contract. A warranty in a contract of sale meant in England a stipulation of such a nature as to give rise to a claim for damages in the case of a breach, "but not to a right to reject the goods and treat the contract as repudiated." [See definition in Sale of Goods Act, s. 62 (1)]. There was nothing in the law of Scotland corresponding to such a warranty, and as it was intended that the Scottish law should be preserved, "warranty" was specially defined to be "a failure to perform a *material* part of the contract," [sect. 62 (1)]. It was further enacted [sect. 11 (2)], that in Scotland such a failure on the part of the seller entitled the buyer either to repudiate the contract or to hold to it and claim damages. In other words, a warranty affecting the contract of sale in Scotland, and relating to a material part of the contract, has the combined effect of an English condition precedent and of an English warranty.

The case of *Midland Discount Company Limited* v. *Macdonald* (46 S. L. R. 331) was one of a loan by a money-lender to a small farmer which was said to be "harsh and unconscionable" in the sense of the Money Lenders Act 1900. The amount lent was £50, in respect of which the borrower signed a bill for £65, payable in four months. The farmer had responded to an advertisement of the pursuers, and an agent of the pursuers had visited him and had examined his farm, but had not asked for any security beyond the bill. The sheriff-substitute at Perth, before whom the case came in the first instance, found it not proved that any undue pressure had been put upon the borrower; but he thought the rate of interest too high, and reduced it by about one-half. The sheriff of Perth, on appeal, recalled and found the rate not so excessive as to justify the Court in overturning the contract. The First Division, on further appeal, upheld the contract, and agreed with the sheriff that, considering the risk and the absence of security, the terms were not more onerous than a prudent money-lender ought, as a matter of business, to have required. It was argued for the money-lender in the appeal that it was misleading to translate the rate charged into a rate per cent. per annum, for the rate charged was not strictly interest, but interest plus insurance. The lender was entitled to a bonus or premium to cover the risk run. In giving judgment, Lord M'Laren said:—"It may be that £15 was in excess of the sum required to cover interest and risk; but of this it is very difficult to judge. I think it is a fallacy to consider the question as one of per-centage. This was a small transaction, and I can understand that the money-lender's position might be that he would not enter into any transaction, great or small, for a profit of less than £15.

In *Scotland* v. *Scotland* (46 S. L. R. 335) we have an illustration of an anomaly in the Scottish law of evidence

which was first distinctly established by the case of *Haldane* v. *Speirs* ([1872], 10 M. 537). In the case now under notice a loan of £100 was alleged to have been given by a sister to her brother thirteen years before the raising of the action, in exchange for which advance it was stated that an I O U had been granted at the time, but had since been lost. By the law of Scotland the contract of loan can only be established by the peculiar mode of proof called "writ or oath," the meaning of which is that a writing (not necessarily formal) must be adduced from which at least an inference can be drawn that the money was given in loan and was not donated or paid in discharge of a previously existing debt. Failing this, the pursuer's only recourse is to trust to the defender's admission of loan under a judicial oath of reference. In the case under notice, the passing of the money from sister to brother at the date of the alleged loan was established by the production of an endorsed cheque for the amount; but following *Haldane* v. *Speirs (cit. sup.)*, the Court held this insufficient to permit of parole evidence being led to establish the footing upon which the money was given. The real anomaly consists in the fact that the production of a receipt for the money, signed by the alleged borrower, will throw upon the granter of the receipt the burden of proving that it was *not* a loan, while on the other hand the signature of the alleged borrower on the back of a cheque will not have this effect, although as proof of receipt it is equally effectual. Both in *Haldane* v. *Speirs* and in the case under notice, the judges recognised the inconsistency, but they felt themselves powerless to remedy it.

R. B.

IRISH CASES.

Now-a-days a great many people get their furniture on the hire-purchase system; but hardly so many that one should be bound to presume the furniture in any given house to be

hired until the contrary is shown. This bold presumption comes very near what the appellants wished the Court to adopt in *In re Waugh* ([1908], 2 Ir. R. 612). A doctor had become bankrupt; some of the furniture in his house at the time of adjudication was there on a hire-purchase agreement with some instalments unpaid; was that furniture within the "order and disposition" clause? A number of affidavits set up an alleged notorious custom in the city of Belfast for the supply of furniture on the hiring system, and alleged that by reason of such custom no one would give credit either to a trader or householder merely on the ground of his having a well-furnished house. The Court, however, declined to extend the modifications which previous cases have introduced into the law of reputed ownership so far as to cover the present case. Those modifications were classified by the Lord Chancellor as applying to (a) particular classes of persons, (b) particular classes of goods, (c) goods specially entrusted. The first class is illustrated by hotel-keepers and the second by gas engines. But there seems no reason for extending the modification so as to affect the chairs and tables in a doctor's house.

It is an admitted principle that the Court will not allow its proceedings to be made an instrument of fraud or oppression; the maxim *fraus omnia vitiat* applies to a judgment, wrongfully obtained, as it does to other "acts in the law." But it is also a principle that fraud is not to be presumed, and must be clearly proved. A difficulty in coming to a working compromise between these two principles is illustrated by *Nixon* v. *Lowndes* ([1909], 2 Ir. R. 1). The plaintiff in the action had obtained a judgment by default against the defendant in August 1908, and registered it as a judgment-mortgage against the defendant's lands; he was a brother-in-law of the defendant, his claim was for wages, and there were circumstances of

strong suspicion, pointing to the conclusion that claim and judgment were collusively intended to defeat the defendant's creditors. F. was one of those creditors, who had obtained a judgment against the defendant in October 1908, which he found practically worthless, by reason of the plaintiff's prior judgment. He now applied that the plaintiff's judgment should be set aside, grounding his application on Ord. XXVII, rule 17 (which corresponds to rule 15 of the English Order). This is the general rule as to setting aside default-judgments, and the Court held that it was not applicable to the present state of facts. They held, however, that their inherent jurisdiction would enable them to set aside, on the grounds of "abuse of process," any judgment proved to be collusive and fraudulent as against creditors. In the present case, however, they were unable to say that the evidence, given by affidavits for the purpose of the motion, *conclusively* established such collusion and fraud, though it certainly did reasonably suggest them. The Court therefore took the course of directing an issue to try the question of fraud. The nearest applicable authority seems to be a comparatively old case of *Harrod* v. *Benton* (8 B. & C. 217).

A decision of some importance on "choice of *forum*" is *Limerick Corporation* v. *Crompton Ltd.* ([1909], 2 Ir. R. 120). By a contract, made in Ireland, the defendants had agreed to supply certain electric plant to the plaintiffs; the work was to be done in Ireland, and the alleged breach had of course occurred in Ireland. The plaintiffs brought an action for damages for the alleged breach in the Irish Courts. The defendants moved to stay this action, under a clause in the contract which provided that the contract should "in all respects be construed and operate as an English contract and in conformity with English law." But for this clause, the action would clearly have been within the competence

of the Irish Courts, under the general rules as to service out of the jurisdiction; and the only question therefore was, whether the description of the contract as "an English contract" ousted this jurisdiction. To this question the Divisional Court gave an affirmative answer. The effect of the stipulation was, that the contract must be treated as a contract made in England; it was an agreement by the parties to refer all questions arising under the contract to an English tribunal, and the action must therefore be stayed. *Spurrier* v. *La Cloche* (L. R. [1902], A. C. 450), was referred to upon the meaning of "English contract"; in that case the contrast was between "English" and "foreign," in the ordinary use of the words; but one has to remember that, for many purposes of Private International law, the Courts of each of the Three Kingdoms are in relation to one another "foreign" Courts.

Cases on pleading grow more and more rare, and when one of them does emerge into the Reports it must be noted, in respectful admiration for the devotion to principle of the junior counsel who are its authors. *Toppin* v. *Belfast Corporation* ([1909], 2 Ir. R. 181), is however rather more than a mere pleading-motion; it settles a question of practice whereon the authorities conflicted, namely, Must particulars be given of a mere plea of contributory negligence? To an action for damages for personal injuries caused by negligence the defendant pleaded first, inevitable accident, and second, contributory negligence. The plaintiff applied that particulars should be ordered of both these pleas, and the Divisional Court granted his application. Thereupon, the defendant gave particulars as to the "inevitable accident," but appealed as regards the contributory negligence; the Court of Appeal decided that particulars of this latter plea should generally not be ordered—not unless the applicant can make out a special case for them. And

what is "a special case"? Fitzgibbon, L.J., gives to this vague expression a rather vague definition: "a case in which the party can satisfy the Court that he is likely to be taken by surprise by some accusation or evidence which may be brought against him, and which he cannot be prepared to meet unless told of it beforehand." The task of the party setting out to satisfy the Court in this way seems likely to be a difficult one; he is apparently to guess at some "accusation" underlying the plea of contributory negligence, and then to show that he will be surprised if such accusation is made. In general, therefore, we may take it as decided that particulars need not be given.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

The Laws of England. Vols. III and IV. By the Earl of HALSBURY and other lawyers. London: Butterworth & Co. 1908.

More rapid progress has been made of late in the production of this great work, and that without any lowering of the high standard to which the two earlier volumes attained. Most of the contributors are acknowledged authorities on the subjects on which they treat, and we are sure much of the success must be due to the labours of the Managing Editor, Mr. Willes Chitty, and his assistants. Vol. III states the law as at August 1st 1908. The titles are Bills of Sale; Bonds; Boundaries, Fences and Party walls; Building Contracts; Engineers and Architects; Building Societies; Burial and Cremation. Nobody more competent to treat Bills of Sales could have been found than Mr. H. Reed, K.C., and the subject is thoroughly treated in the 70 pages devoted to it. Bonds is contributed by Sir Edward Carson, K.C, M.P., and Mr. Bowstead. Mr. C. Hunt and Mr. L. T. Thorpe give adequate consideration to Boundaries, Fences, &c., in a little over 40 pages. The two most important and substantial articles are those on Building Contracts; Engineers and Architects, and Burial and Cremation. Mr. Hudson has applied his wide knowledge and experience to the former, with the assistance of Mr. H. L. Ormsbury; and who knows more about the latter subject than Mr. J. Brooke Little? Both these titles are, as might be expected, of considerable length, Building Contracts, &c., taking up over 160 pages, and Burial and Cremation over 170. The part dealing with Cremation necessarily consists mainly of the Cremation Act 1902, and Regulations, as we do not think there have yet been cases on the Act. It is curious to note that it is undecided whether the Licence of the Secretary of State is necessary to legalise disinterment under a Coroner's order. Sir Edward Brabrook, with whom Mr. D. D. Reid has collaborated, gives the weight of his great authority to the title of Friendly Societies. Vol. IV states the law as at December 1st 1908. It speaks well for the revision of the work as it went through the press that the law should be brought up to so recent a date. The titles are Carriers; Charities; Choses in Action;

Clubs; Commons and Rights of Common. Mr. Macnamara, as might be expected, deals with his own subject --Carriers—with all the skill bought of long familiarity. Mr. C. Hunt, who contributes the important heading "Charities," has had the advantage of obtaining its revision by Mr. C. A. Cook, the chief Charity Commissioner; while Mr. G. Pemberton Leach deals with Commons, &c., single-handed. Two of these subjects are very fully treated, Charities covering 256 pages, while Commons occupies 173. The two shortest titles—Choses in Action, and Clubs—are by Mr. W. D. Rawlins, K.C., with Mr. W. E. Warren, and Sir Edward Carson, K.C., with Mr. William Bowstead respectively. The system is continued in each of these two volumes of numbering the paragraphs consecutively through each volume, which much facilitates reference. It has now taken four large volumes to get as far as the end of Commons, so some idea can be formed as to the number of volumes required to complete the whole work, and the time it is likely to occupy. It rather looks as if it would exceed the 20 volumes originally estimated. Everyone will wish the noble and learned Editor health and strength to see it through.

The Magistrate's General Practice. By C. M. ATKINSON, M.A., LL.M. London: Stevens & Sons. 1909.

If we remember aright Mr. Atkinson was Author of a work called *The Magistrate's Annual Practice*, which, started in 1895, was continued till 1900. It was a very useful work, but seems to have been discontinued then, and now re-appears under a slightly changed title, and will not be, we presume, an annual work. It is connected with the previous work by being referred to in the Preface as the sixth edition. A great deal must have been done to bring it up to date when so many important statutes have been passed, and so many cases decided since the issue of the last edition. We are told that four or five hundred decisions of the High Court "have served to enrich, modify, or over-rule the Case law which then obtained." A large amount of the work must have been re-written in order to include the provisions of the two last Licensing Acts and the very recent Children Act of 1908; and entirely new titles have been introduced for "Motor Cars," "Musical Copyright," etc. Another important addition is the introduction of the provisions relating to Factories and Workshops, which were not included in former editions. The work seems to us to have been thoroughly well done,

and forms a substantial though not unduly bulky book, the text and Index containing some 1,200 pages. The title of greatest length is that of "Intoxicating Liquor Laws," which takes about 60 pages. Not the least useful part is the Appendix, which contains 350 pages of statutes, forms, etc. For anyone who wants a rather less bulky volume than *Stone*, this work is to be highly recommended.

The Yearly County Court Practice, 1909. 2 vols. By His Honour Judge WOODFALL and E. H. TINDAL ATKINSON. London: Butterworth & Co.

This is one of the series of Yearly Legal Practices and has been issued rather later than usual in order to include the Companies (Consolidation) Act 1908, Workmen's Compensation Rules 1908 (Series 2), and further New County Court Rules. Both County Court Rules and Forms and Workmen's Compensation Rules and Forms were issued in March and October, and some changes in procedure have had in consequence to be incorporated, and the notes on that very important chapter dealing with workmen's compensation have been revised. We don't think any very important decisions have been given in the past year dealing with the subjects treated on in this work, but a considerable number of cases have had to be considered and referred to in order to bring it up to its high standard. The only important Acts of Parliament which have been added to the second volume, which deals with Acts conferring special jurisdiction in the County Courts, are the Agricultural Holdings Act 1908 and the Companies (Consolidation) Act 1908.

Selected Speeches. By Sir EDWARD CLARKE, K.C. London: Smith, Elder & Co. 1908.

Sir Edward Clarke is one of those few prominent advocates who have also attained considerable success in the House of Commons. The present volume of his speeches contains more speeches on political and social questions than forensic. The reason for this is not far to seek. There are not many forensic speeches that can be thoroughly appreciated without a greater knowledge of the evidence than can conveniently be imparted in an introduction or notes, and also, as Sir Edward Clarke observes in his Preface, may "contain comment and criticism which it was justifiable to utter, but would be ungenerous to reproduce." The forensic speeches are five in number. Three of them must be well in the memory of all who have studied the reports of famous criminal trials, although the

earliest of them was delivered in 1877 in what is called the *Penge Case*, although the Author was unsuccessful in securing the acquittal of his client, Patrick Staunton, under the somewhat peculiar circumstances of the trial, yet his sentence was commuted, and his conduct of the case considerably increased Mr. Clarke's reputation. In fact, he infers that the result of that case and the *Detective Case*, in which he got his client off, was that his income suddenly rose from £3,000 a-year to £5,000, "and continued its progress from that higher level." Of the other two speeches we have always considered his defence of Adelaide Bartlett his most masterly performance, and there is the high authority of the late Lord Russell of Killowen that Sir Edward Clarke's speech in the case of *Allcard* v. *Skinner* was the best he had ever heard him make. Probably the greatest tribute to his prowess as a political speaker is the fact that he was selected by Mr. Balfour to follow Mr. Gladstone's speech in bringing in the Second Home Rule Bill in 1893. The speeches are all worth reading, and some of them are very much in point on the political questions of the present day; notably, the Home Rule speeches, that on the Church in Wales, the Liquor Traffic, and perhaps Tariff Reform. Few politicians will agree with all his speeches, as his political course has been a remarkably independent one; but all will readily recognise his ability, his courage, and his high principles.

Digest of English Case Law.—Supplement. 1898—1907. 2 Vols. By EDWARD MANSON. London: Sweet & Maxwell. 1908.

Mr. Manson does a great service to the profession by the production of this *Digest.* It will be remembered that in 1898 Mr. John Mews published his *Digest of English Case Law*, and thereby earned the undying gratitude of all practising lawyers. He has also supplemented his work by *Annual Digests.* But now in process of time, to search through all the annual volumes to find the most recent decisions has become wearisome, and the heavy labour of digesting all the digests into one has now been accomplished by Mr. Manson. It is no little thing to have in only two volumes—substantial ones it is true—all references to the decisions in the Superior Courts and selected ones in the Irish and Scotch Courts, with a collection of cases followed, distinguished, etc. In a work like this, next to accuracy the most important is arrangement, and to this Mr. Manson has paid special attention. The literary merits

of arrangement are aided by such devices as "catchwords" in bold type, cross-references, etc. A good example of the value of this compilation will be found by turning to the title "Master and Servant" in the second volume. Under one of the sub-sections of the section "Injuries to Servants" will be found all the cases under the Workmen's Compensation Acts 1897 and 1900, which occupy no less than 100 columns. Other lengthy titles are "Ship and Shipping," of about 150 columns; "Local Government," of about 120 columns; and last, but by no means least, "Company," with 170 columns. The note on *Faulkner* v. *Regem* is hardly adequate. Anyone reading it would think that the erroneous arraignment and the trial and conviction were on one and the same day, whereas the trial was adjourned to the next Sessions on account of the objection to the manner of arraignment.

The Effects of War on Property. By ALMÁ LATIFI. London: Macmillan & Co. 1909.

Dr. Latifi comes before the public with the advantage of a distinguished Cambridge career and the benison of Dr. Westlake, who supplies a chapter on Belligerent Rights at Sea. The body of the work deals in a most methodical fashion with every aspect of its subject-matter, and those who follow its guidance will seldom be led astray. Besides, the Author has humour and independence; two rare qualities in a technical writer. His assumption that it is quite possible for the belligerent shareholders of a limited company to abstain from all interference with its affairs during war "without doing themselves or the company any harm," obviously needs consideration. Nor is any authority forthcoming for the statement that a neutral flag will not protect a ship, some of whose owners are hostile. If the neutral flag protects hostile goods, it is as certain as anything can be that neutrals will not allow their ships themselves to be subjected to capture and forced sale merely because a belligerent stranger has a share in them. Dr. Latifi discusses, with considerable knowledge of naval strategy, the problem of the exemption of private property from maritime capture, and comes to a conclusion unfavourable to the proposed change in the traditional attitude of Great Britain. On the whole the work is an excellent contribution to the literature of International law, and its value is by no means to be measured by its bulk.

The Laws of War between Belligerents. By P. BORDWELL, Ph.D., LL.B. London: Stevens & Sons. 1908.

The Author is not always very definite in his grasp of principle. Thus he eulogises the Hindus (p. 8) for not burning the enemy's country in war, nor cutting down the trees and plants, whilst (p. 3) he approves Sherman's march of devastation as calculated "to bring the pressure of war home to the people of Georgia." So, he condemns the confiscation of debts, but maintains the confiscation of cargoes. The Bulgar-Servian war of 1885 is not referred to, and we are surprised to learn that the bad old wars of Frederic the Great's time caused less suffering to the non-combatant population than the wars of the present day. It is a very disquieting sign, nevertheless, to find so many humane men apparently willing to endorse any and everything that can be represented as calculated to break down the resistance of an enemy. If we are not careful, we shall soon be back in the licence of the bygone centuries. Professor Bordwell's book is divided into two sections: the first historical, the second expository. It is easy reading and furnishes a useful compendium of the subject, but several misprints have escaped notice such as "Loose," at p. 11; "Annuarie," at p. 282; "civl," at p. 303; and "Belgiums," at p. 345. Edinburgh, we observe, is omitted from the list of meeting places of the Institute of International Law on p. 101. The Hague and Geneva Conventions of 1907 are set out and analysed, with some acute criticisms in points of detail.

The Workmen's Compensation Act 1906. By V. R. ARONSON, M.A., B.C.L. London: T. Fisher Unwin. 1909.

Notwithstanding that this branch of the law has become of considerable importance, we doubt whether the Author has been wise to produce so bulky a volume on what is, after all, but a departmental subject. The book, it is true, is beautifully printed, while the production is artistic; but it hardly seems a book adapted for the wear and tear of Chambers and Court. The reading matter of the book is excellent. The Act is set out in sectional form, with very good and readable notes. All the latest cases are included (with, we observe, only a single reference). We have been unable to find, either in the text or Index, anything on the question of evidence, although in these cases the question not infrequently arises, *e.g.*, on statements by deceased workmen. There is a

useful summary of the Act, and there are extremely full Appendices, which include the Treasury Order regulating Fees in County Courts, Regulations by the Registrar of Friendly Societies, and other kindred matters.

The Science of Jurisprudence. By HANNIS TAYLOR, LL.D. New York: The Macmillan Co. 1908.

In this learned treatise the growth of Positive law is unfolded by the historical method, and its elements classified and defined by the analytical. Following this scheme the book is therefore divided into two parts. In Part I we find the analytical and historical methods contrasted, and Jurisprudence and its province defined. Then follows the external history of Roman and English law, with a chapter on English law in the United States; and, in conclusion, an historical sketch of Roman and English law combined. Part II deals exhaustively with Law Proper or State law, Law by analogy or International law, and International Rules to prevent Conflict of Laws. A very full List of Authorities cited is furnished together with a Table of Cases cited. In the Appendix the Author gives us the epoch-making tract of Pelatiah Webster in which is embodied the first draft of the existing constitution of the United States of America, to which is appended the notes to the re-publication made at Philadelphia in 1791. The learned Author is to be congratulated on the production of a work the study of which—if we may quote the words of Dr. von L. Mitteis of Leipsic University—"appeals to the heart of every man." It is appropriately inscribed to the Right Honourable James Bryce and Professor Thomas Erskine Holland, K.C., "Masters of the science of Jurisprudence."

History of the Roman-Dutch Law. By the Hon. J. W. WESSELS. Grahamstown: African Book Company. 1908.

There has always been good ground for complaint—which no longer exists with the arrival of this standard work—that the student of Roman-Dutch law, unless able to read old Dutch, had no opportunity of acquiring information concerning the historic evolution of this most scientific system of law. The work under review is divided into two parts, the first dealing with the "general development of the Dutch system of Law," the second with the "Law of Persons, Things and Obligations." Naturally, the first part presents the greater attraction, owing to the fact that the learned Author has made such a profound study of early German history, which history has left a

deep impress on the Roman-Dutch law of to-day. Perhaps the most fascinating chapters are the 31st and 32nd, which deal with the writers of the seventeenth and eighteenth centuries. Naturally, Johannes Voet comes in for the lion's share of praise; but few will quarrel with the Author for his profound admiration of Cornelius van Bynkershoek, of which there is no attempt of disguise. Mr. Justice Wessels is well known to be fearless both in criticism and in expression of opinion, for which one admires him; at the same time, his strictures on the law of the Cape Colony and the Transvaal affecting ante-nuptial contracts, on page 465, strike one as being fantastic. In answer to his oratorical question "When will the pendulum swing back again?" many will reply, "Let us hope that it never will." On the other hand, the reader who knows his law will cordially agree with the trenchant comments, to be found on pages 476 and 477, as to the unsatisfactory nature of the law regarding the difference between movables and immovables. The reviewer is much struck by the lucid and characteristic manner in which either the history or principles of any particular branch of law are summed up after having treated of them. If for no other reason the treatise were commendable to both the lawyer and student, this in itself would make it so. For instance, how better could the history of the law regarding the alienation of immovable property be tabulated than in the manner adopted on page 500? There is an excellent Index, and the List of Authorities is most complete, but one regrets to learn that the *Oud-Nederlansch Burgerlyk Recht* of Professor Fockema Andreæ only came to hand after the greater portion of the History had gone to press. The account of the trial of *R.* v. *Gebhardt* appearing in the Appendix will explode a generally accepted belief that the torture of slaves in the Cape Colony went unpunished *in the old times*. Obviously, no Roman-Dutch law library can claim to be complete unless comprising this work by one of the most eminent jurists in South Africa.

Responsible Government in the Dominions. By A. B. KEITH, M.A., B.C.L., M.R.A.S. London: Stevens & Sons. 1909.

In these days, when the development of the resources and sympathetic knowledge of things appertaining to the British Dominions beyond the seas excites so large a share of interest in the mother country, a book of this nature merits more than a passing reference. In it Mr. Keith shows us how responsible government was originally

given, and the legal basis upon which it rests. The duty of Dominion Governors and ministers is dealt with, and the powers and privileges of Dominion Legislatures are fully defined, together with the relations between the Houses of Legislature. Chapter VIII is a very important one, comparing as it does the Federations of Canada and Australia. Let us hope, however, that Mr. Keith's forecast of the Federation of South Africa may be falsified, and that that colony, profiting by the experience of Canada and Australia, may continue along its present path, which leads to unification. The relations between the Mother country and her Colonies find ample place. The limitations on the Prerogative of the Crown, the Judiciary, Church, and Judicial Appeals, all have due consideration given to them. To sum up, it may be said that, although the work is more essential to the politician than the lawyer, at the same time it would form a valuable and instructive addition to any legal library.

Criminal Appeal Reports. Vol. I. By HERMAN COHEN. London: Stevens & Haynes. 1909.

Mr. Cohen gives a full report of the proceedings of the Court of Criminal Appeal from May to December last year, including not only all the appeals but all the applications for leave to appeal. Though many of the former are of no legal value, as they merely record the bare fact that a defendant convicted of a certain offence applied for leave to appeal and was refused, yet there is a considerable number of valuable decisions, which show by what principles the Court has been guided in giving leave to appeal, and how slight mis-directions and omissions on the part of the judge in the Court of Trial are dealt with. They also illustrate pretty clearly what sort of case involves, in the opinion of the Court, a "miscarriage of justice." It is important to notice the repeated expressions of regret by the Court that they have not the power to direct a new trial. As regards the practice of the Court, perhaps the most important points to notice are that they will not retry the case, that they will very rarely allow witnesses to be called who could have been called at the trial, and that if a defendant chooses to let out that he has been previously convicted he must generally take the consequences. There are also some decisions on points of law which are worth noting, such as *R.* v. *Muirhead* which follows *R.* v. *Jones*, and there is an important *quære* in *R.* v. *Pearson* whether a general verdict on an indictment for stealing and receiving can stand when there is no evidence of stealing.

Reports of Rating Appeals, 1904—1908. 2 Vols. By E. M. KONSTAM. London: Butterworth & Co. 1909.

These reports are a continuation of Ryde and Konstam's *Rating Appeals* by Mr. Walter Ryde and the present Editor. A number of very important decisions both on the law and practice have been given in that work, and we do not think that we are speaking too strongly when we say that the present reports are indispensable to all who are concerned with the important and difficult branch of law of which they treat. • Mr. Konstam has had the advantage of being personally engaged in a not inconsiderable number of cases which he reports, and although Mr. Ryde is no longer responsible for the publication, the Editor is indebted to him "for the use of his notes and for much inestimable help and advice," and what Mr. Ryde does not know about Rating "is not worth knowing." Between eighty and ninety pages are taken up with cases from the London Quarter Sessions, and about sixty by cases from certain other Quarter Sessions. The great value of these Quarter Sessions reports is the valuations they give, such as that of the railway line at Hertford Quarter Sessions, that of a Railway Goods Yard by the Recorder of Cambridge, that of an electric undertaking at the London Quarter Sessions, and of electric tramways at Middlesex Sessions. The House of Lords has given a most important decision upon the rating of branch lines in the *Great Central Railway* v. *Banbury Union*, and binding decisions on the rating of light railways, sewage farms, and tolls in gross have, as Mr. Konstam says, "put an end, for the present at any rate, to the long controversy upon the rating of premises equipped with machinery." The rating of an immense variety of kinds of property has been discussed and many important points of practice settled; and now Mr. Konstam is no doubt looking forward to a new Valuation Act and the taxation of Ground Values as a fresh field for his labours.

Second Edition. *Banking and Currency.* By E. SYKES, B.A., with an introduction by F. E. STEELE. London: Butterworth & Co. 1908.

Banking Law. By R. W. HOLLAND, LL.B., and A. NIXON, F.C.A. London: Longmans, Green & Co.

Second Edition. *The Law of Banking.* By Sir JOHN R. PAGET, Bart., K.C. London: Butterworth & Co. 1908.

These three works may be roughly described as dealing with the theory, practice, and advanced practice of Banking. Mr. Sykes'

valuable little work was intended mainly for those students who are reading for the examinations held by the Institute of Bankers and kindred bodies. There are only about three chapters that deal with the actual law of Banking, but the principles and history of the Currency, the Gold Standard, Bimetallism, the history and position of the Bank of England, the system of the Clearing Houses, Foreign Exchange, Money Market, are all dealt with in a manner that renders the book of the greatest interest and service, not only for those preparing for a banking or commercial career, but also to all those who, whether lawyers or laymen, wish to get a clear idea of the principles of these important subjects. A selection of test questions taken from papers set by various Examining Bodies increases the value to students.

Messrs Holland and Nixon's *Banking Law* forms one of Messrs. Longmans' well-known Commercial series. It is intended for business men and students, and has, for the benefit of the latter, questions at the end of each chapter, and in an Appendix one hundred questions selected from the recent examinations of the Institute of Bankers. The Editors express some regret that they have felt compelled to include references to cases. Some cases are dealt with at a considerable length considering the scheme of the work; but they are cases of the importance of *Colonial Bank of Australasia* v. *Marshall* and *Gordon* v. *Capital and Counties Bank*. We have examined several parts of the book, and have nothing but praise for its accuracy. The Appendices contain the questions before referred to, Bills of Exchange Act 1882, Crossed Cheques Act 1906, and Bank and Commercial Forms.

Sir John Paget's book has well established its position as one of the leading authorities on its subject. It is written, it seems to us, from the point of view of the Banker, and to advise him in his relations with his customers. It examines with great acuteness many of the difficult and doubtful points, which seem to be more abundant in Banking than in most other branches of the law; and sets out the pros and cons in opposition to each other. He does not fear to criticise even judgments of the House of Lords, as in *Gordon* v. *Capital and Counties Bank*. This last has, Sir John says, "been severely criticised both in legal and banking circles," and concludes that the present situation is "entirely unsatisfactory." The most important statutory additions are the Bills of Exchange (Crossed Cheques) Act 1906, and the Public Trustee Act, the relation to

which of Banks is examined with care. The learned Author is not slow to point out practices and beliefs on the part of Bankers which he believes to be unsound. He refers to the "common superstition among Bankers that the collecting Banker is not concerned with the indorsement on an order cheque," and gives instances where omissions in consequence have been treated as negligence. The practice of Bankers to require the ostensible payee to sign on back of cheque he considers not only "without justification," but of very doubtful utility. A very interesting chapter is that on "valuables for safe custody," and Sir John supports the view adopted by the Central Association of Bankers.

Second Edition. *Supplement to the Judicial Dictionary.* By F. STROUD. London: Sweet & Maxwell. 1909.

This supplement brings down the decisions comprised in the second edition of Mr. Stroud's well-known work to the end of the year 1906. Later references are introduced because they were decided in the first instance before that date and afterwards heard on appeal, or because they are of exceptional importance. Mr. Stroud is also in this volume making a strenuous endeavour to further the complete union of England and Scotland by including "the definitions of English Affairs which have been given by the Scottish Judges." A very considerable number of references will have to be added to the former volumes, and with this one Mr. Stroud has supplied an ingenious marker, with marks and figures which form a gauge to find any particular line in the *Judicial Dictionary*. Among the many decisions, one strikes us as, at first sight, rather quaint, namely, that a dog does not *walk* when he goes on three legs. As might be expected, there are several references to Workmen, but we have not found any to "Casual" or "Whisky." Over both these words there has been much discussion, but we do not think any decision was given by a superior Court as to the latter word.

Second Edition. *The Companies Act 1907 and the Limited Partnerships Act 1907.* By Sir F. BEAUFORT PALMER. London: Stevens & Sons. 1908.

The recent Companies Act has made so many important changes in the law that it is well to have an interpreter to it. It would be impossible to have a better interpreter than Sir Francis Palmer who combines the advantage of an unrivalled knowledge of Company law with that of having been a member of the Departmental

Committee of the Board of Trade, of whose report the Act was an outcome. The Act begins by dealing with prospectusless Companies, and requiring them to file a statement in lieu of prospectus analogous to the information required from companies that issue prospectuses. As a specimen of a note we call the reader's attention to that on (2) "The above enactment is a specimen of the worst style of Parliamentary drafting, and it is no easy matter even for a lawyer to translate its obscurity into plain English. Apparently it should be read as if the words following were added after the last word," and here follows over a page of provisions. The law as to payment of commission for underwriting shares is altered, but the note points out that a perfectly free hand is not given to vendors, etc. By removing doubts as to the validity of perpetual debentures, the Act "over-rides an antiquated rule of equity and brings the law into accord with what has been the practice." Another provision of importance is that which enables a company which pays off debentures to keep the same alive for re-issue. Probably the two other most important sections are those authorising payment of interest out of capital during construction of works, and enabling a company to enforce specific performance of a contract to take debentures. The Limited Partnerships Act 1907 is subjected to rather severe criticism, and the Author considers, "not without some reason," that it "falls very short of a workable scheme, and that the facilities afforded by it compare unfavourably with those afforded by the Companies Acts."

Third Edition. *Simpson on the Law of Infants.* By E. J. ELGOOD, B.C.L., M.A. London: Stevens & Haynes. 1909.

The Law of Children and Young Persons. By L. A. ATHERLEY JONES, K.C., M.P., and H. H. L. BELLOT, D.C.L., with an introduction by the Right Honourable H. GLADSTONE, M.P. London: Butterworth & Co. 1909.

Mr. Elgood edited Mr. Simpson's work so long ago as 1890, and it is not surprising that considerable additions have been made in the present edition. As some of the statutes affecting the subject passed since 1890, Mr. Elgood mentions the Custody of Children Act 1891, the Trustee Act 1893, the Sale of Goods Act 1893, and the Married Women's Property Act 1907. Many more statutes might be mentioned, such as the Betting and Loans (Infants) Act 1892, the Dangerous Performances Act 1897, and the Prevention of Cruelty to Children Act 1904, which, with others, are referred

to in the body of the work. The main subject of the treatise being what we may perhaps call the civil position of children, no detailed references are given to the *penal* Acts, with the exception of some references to the Cruelty to Children Act 1904. There is no reference to the recent and important Children Act 1908, as it only received the Royal Assent on December 21st 1908. The work is divided into four parts. Part I deals with the capacities and incapacities of infants. In this part is considered the much debated subject of "Necessaries." Part II—Parent and Child - is concerned mostly with the rights of the parents, and judicial and legislative interference with them. Part III—Guardian and Ward—is by far the longest part, and deals very fully with such subjects as maintenance, advancement, marriage, and the duties of guardians as to their wards' property. The concluding part is concerned with procedure. A large number of decisions has been incorporated in this edition, and the whole forms a complete digest of the law on the subject.

As Mr. Elgood's book gives the civil aspect of the status of infants, that by Mr. Atherley Jones and Mr. Bellot gives the penal aspect, both as regards the protection of the young and their punishment and reformation. It is of course largely concerned with the Act of 1908, "the Magna Charta of Children," and the Authors are sufficiently sanguine to hope that "if local authorities efficiently discharge their duties under this statute, the cruel treatment and wilful neglect to which child life has hitherto been exposed will henceforth be impossible. The text of the work may be said to be this Act with copious notes and references to Cases and such statutes as the Criminal Law Amendment Act; but between Part II and Part III are interpellated three chapters on the Custody and Guardianship of Infants, Employment of Children and Young Persons, and Offences against Children and Young Persons. The first of these chapters deals with a difficult subject in what strikes us as an excellent manner. The Children Act is then resumed with Part III. The rest of the work is entirely taken up with the remaining parts of the Act, of which the most important are those dealing with Reformatory and Industrial Schools and Juvenile Offenders. The Appendix contains the Prevention of Crimes Act 1908, Probation of Offenders Act 1907, and the Criminal Evidence Act 1908. The numerous important provisions contained in the Act well deserve close attention, and the learned Authors are entitled to thanks for their efforts to facilitate the perusal.

Third Edition. *The Law and Custom of the Constitution.* Vol. 2. The Crown. Part II. By Sir W. R. Anson, Bart., D.C.L. Oxford: The Clarendon Press. 1908.

With this volume Sir William Anson completes his survey of the Departments of Government, their constitution and working, and of the relations of the Crown to the Church and the Courts. After a short introduction on the growth of the Departments, and how an ignorant minister is supplied with advice and information, the Author treats concisely, but clearly, the various Dominions and Dependencies of the Crown. There is a short chapter on the Crown and Foreign Relations; and the remaining chapters are on the Revenues of the Crown and their Expenditure, the Armed Forces of the Crown, the Crown and Churches and the Crown and the Courts. All these chapters combine an historical *résumé* with details of modern constitution and working. The whole work is one of authority, and an invaluable work for reference on all subjects connected with the Constitution.

Third Edition. *Foreign Judgments and Jurisdiction.* By Sir F. T. Piggott, M.A., LL.M. London: Butterworth & Co. 1908.

Nothing more elaborate could be imagined than Sir F. T. Piggott's book. He penetrates into every ramification of the subject; and if his work has not the same lucidity and coherence as mark that which he has published on Exterritorial Jurisdiction, it is in part due to the way in which the ground is encumbered with decaying cases. Perhaps it may be partly due, however, to the scientific zeal with which the Author digs down to the very foundations of the law; a process which is apt to result in unsettling them. The complexity of the subject is enormous, and its intricacy may be measured by the fact that a Colonial judgment, approved by the Privy Council, might conceivably be ignored, as proceeding upon wrong views of jurisdiction, by every Court in England.

The present edition is practically a new book. The revolutionary *Faridkôt* case is accorded the serious importance it deserves: and the Author draws attention to a case of *In re King* (40 W. R. 508) which appears to dictate a general power of English jurisdiction over the whole world in respect of rights registered in terms of any English statute. At p. 230 he is open to the charge of confusing Public International law with Private; but in general his doctrine is as sound as his research is exhaustive. We do not observe that

Lett v. *Lett* (See L. M. & R., Aug. 1906, p. 472), has been noted by the Author when dealing with restraint of foreign proceedings. He regards *Carron Iron Co.* v. *Maclaren* as of comparatively little authority since *Ellis* v. *McHenry;* we trust with reason. The difficulties of proof-correction from Hong Kong must be great, and in spite of a free use of inserted slips, and a generous list of *errata*, trifling typographical errors occur on many pages.

Third Edition. *Modern or Equitable Estoppel and Res Judicata.* By A. CASPERSZ, B.A. Calcutta: S. K. Lahiri & Co. 1909.

The plan of dividing the treatise into two parts, each part with a separate Table of Contents, Table of Cases, and Index, is hardly to be commended, and one fails to see any advantage in the system adopted. The first part deals with "The doctrine of changed situations," and the second with "The conclusiveness of judgments, decrees and orders." Twelve years have elapsed since the second edition was printed, and the learned Author has found it necessary to largely augment his List of Cases. Naturally, such local idiosyncracies of Native law as Adoption, the Hindu Widow, and the Joint family, produce the evolution of principles unfamiliar to the English practitioner, but taking it as a whole, there seems little difference between the law of Estoppel as administered in India and in England. We gather that the two former editions have met with considerable success in India, and see no reason why the present one should not do the same. The work is based on the Tajou lectures of 1893, and Mr. Caspersz appears to have exercised no small amount of research, comprehension and industry, in preparing this treatise.

Third Edition. *Anglo-Muhammadan Law.* By Sir R. KNYVET WILSON, Bart., M.A., LL.M. London: Thacker & Co. 1908.

The present edition has been so extensively revised that the whole character of the work has been altered. In the Preface the learned Author—who was reader in Indian law at Cambridge University—has enumerated the various decisions during the last five years which merit special mention, but as to their general effect the uninitiated reader is quite unable to judge. Even to the casual reader the historical and descriptive introduction must present many attractions. It is a miniature history of Islam in India, the origin and development of Muhammadan law, both before and after English rule was

introduced, together with a vivid description of the various sects and the constituent elements which go to make up Muhammadan law. In the text are treated the main points and principles of law, all of which are well annotated and lucidly illustrated. The Appendices are four in number—(a) The Code of Criminal Procedure; (b) Family Settlements by way of Wakf; (c) The Statutory law of pre-emption in the Punjab and Oudh; (d) The Koranic basis of Anglo-Muhammadan law. We notice that many words are spelt in a manner unfamiliar to us, and conclude that the spelling one is accustomed to is the Anglicised form of the same words. The treatise is evidently intended for students of and practitioners in Indian law, and owing to the steady increase in their numbers, the book will no doubt appeal to a larger circle of readers than has been the case with former editions.

Fourth Edition. *The Law of Agency.* By WILLIAM BOWSTEAD. London: Sweet & Maxwell. 1909.

That this work on Agency is popular is amply proved by the fact that, although the third edition was published in 1907, a fourth has now been found necessary. Two important cases—*Oppenheimer* v. *Frazer* (L. R. [1907], 2 K. B. 50), and *Oppenheimer* v. *Attenborough* (L. R. [1908], 1 K. B. 221)—have in between been decided by the Court of Appeal, in which both the effect and limits of the Factors Act have been carefully scrutinised. The result of these two decisions has been carefully noted and commented upon in the present edition. A slight improvement has been introduced by, in the majority of cases, inserting in the notes, references to the *Law Journal Reports*, as well as in the Table of Cases, the plan previously adopted. The scheme of this work makes for simplicity of reference, and has very much to commend it. The whole book is divided into Articles, each of which, after dealing with its own particular point, has copious and illuminating illustrations bearing thereon, together with notes, attached to the end. In the Appendix is given the Factors Act 1889 and the Prevention of Corruption Act 1906. Both the Index and the Tables of Cases are copious and complete. As a treatise on Agency it may well be recommended to the notice of readers, not at present included in the large circle already familiar with the work.

Fourth Edition. *The Law of Employers' Liability and Workmen's Compensation.* By THOMAS BEVEN. London: Stevens & Haynes. 1909.

In the preface Mr. Beven gives a *résumé* of his struggles to produce the various editions of this book, a recitation which is not only amusing, but will be instructive to any would-be author. The text is divided into three parts. The first Part treats of the Employers' liability at Common law, and is divided into various propositions or principles derivable from the decisions. Part II deals with the Employers' Liability Act 1880. First of all comes the text of the Act itself, and again certain propositions deducible therefrom are given us. The learned Author is of opinion that this course can safely be adopted, owing to the fact that the Case law under the Employers' Liability Act 1880 is now pretty nearly complete. The Workmen's Compensation Act 1906 occupies the third Part, and this is the portion of the treatise that creates the most lively interest. It is not very difficult to see that Mr. Beven does not rank high this democratic piece of legislation, and he sums up the situation in the formula:—"The real friend is Codlin not Short." Here again he adopts the method so highly commended to him by the County Court Judge, who said:—"I use your book in my Court. It is a very good one. The chief advantage of it is that you print the Act in legible type unencumbered with note or comment, so that one can see what *it* says." Still, when we come to what Mr. BEVEN says, we find, as one would expect from him, that the learned Author's comments are trenchant and to the point. The cases are analysed lucidly and without unnecessary verbosity, the points decided, as it were, "hit one in the face." In the Appendices are given the various Rules and Forms, issued by many authorities, the length of which rouses the Author's ire. "I hardly venture to groan under this pestilent abuse by all these high authorities of the power to make rules," is quite one of his mildest comments. The whole treatise is worthy of Mr. Beven's well-known skill, and it will continue to occupy the position of being one of the earliest as well as one of the ablest of the expositions of the law of Employers' liability.

Seventh Edition. *Seaborne's Law of Vendors and Purchasers of Real Estate.* By W. A. JOLLY, M.A. London: Butterworth & Co. 1908.

Mr. Jolly's "concise manual" has been enriched by some recent cases of considerable importance. For instance, the decision in

Nisbet and Pott's Contract has much extended the doctrine of constructive notice. The right of the vendor to rescind the contract has been qualified by the recent cases of *Jackson and Harden's Contract*, *Quinion* v. *Horne*, and *Weston* v. *Thomas*, which enforce the vendor to act *bonâ fide*, and not arbitrarily or unreasonably. The only legislation of importance since the last edition is the Married Woman's Property Act of 1907, which has removed some difficulties caused by a rather narrow construction of the law. The question of Liquidation of Companies has also received more attention in consequence of some recent decisions. The work, without ceasing to merit its title of "concise," is full of information.

Seventh Edition. *The Law of Bills of Exchange.* By Sir M. D. CHALMERS, K.C.B., C.S.I. London: Stevens & Sons. 1909.

Few lawyers possess a wider or more profound knowledge of the subject of negotiable instruments than Sir M. D. Chalmers. The draftsman of the Bills of Exchange Acts of 1882 and 1906, it would be hard, if not impossible, to find one more qualified to write a standard work thereon, of which the former Act is a codification, which has stood the test of a quarter of a century. The learned Author not only has studied his subject from the English standpoint, but has made himself familiar with the European and American law on this head. To those who wish to study the historical aspect of the law of Bills of Exchange and kindred documents, one cannot do better than advise a careful perusal of the Introduction to the Third Edition, retained in the present one, which consists of a *résumé* of the history, both lucid and erudite, in which is traced the growth of and use of the negotiable instrument both on the Continent and in England. The main part of the text of the book is taken up with the Bills of Exchange Act 1882 annotated section by section. In the Appendices is gathered together certain matters germane to the main subject, and statutes bearing directly and indirectly thereupon. It only remains to be said that the present edition fully maintains the high standard set by the learned Author in former editions.

Eleventh Edition. *Indermaur's Principles of the Common Law.* By JOHN INDERMAUR and C. THWAITES. London: Stevens & Haynes. 1909.—Originally produced with a view to the Law Society's Examinations, we think that this book can now claim a wider circle of readers than law students, though we can imagine no

more useful guide for that class. In spite of a great deal of additional matter, the work has, the Authors claim, actually been slightly reduced in size by revision. The book is divided into three parts, of which the first deals with Contracts, the second with Torts, and the third with Damages and Evidence. The style is admirable and simple, and praiseworthy use is made of italics. As an example of the Authors' concise methods we may take the law dealing with the procuring a person to break his contract, and its limitation by the Trades Disputes Act 1906. This is dealt with in some three pages, but the law seems to be outlined with quite sufficient clearness. The Appendix includes the Law of Distress Amendment Act 1908.

Fifteenth Edition. *Chitty on Contracts.* By WYATT PAINE. London: Sweet & Maxwell. 1909.

Fifteen editions in a little over eighty years seems a very fair number, but for the last few years the editions have been coming out at shorter intervals than was formerly the case, and the last edition came out as lately as the autumn of 1904. The present Editor has done a good deal more than simply include the recent cases, and has aimed at making the work "a compendious and thoroughly up-to-date disquisition upon the whole law of contractual obligations as regulated by statute and interpreted by judicial decisions." The amount of additions and re-writing that the Editor is responsible for will be shown by two facts. The first is that the increase in bulk is something like one hundred pages, and this, too, in spite of the fact that Mr. Paine has not only limited his alterations but has also made considerable omissions. The second fact is, that he has either discussed in the text or included in the notes "several thousand additional cases." These, it is apparent, cannot all have been decided since 1904, and they have been collected largely to support new statements and qualify old ones. The Workmen's Compensation Act 1906, and the Companies Act 1907, are both responsible for some additions, but all through the work we find here a few lines added to a paragraph qualifying or supporting the statements in it, and there a new paragraph, mostly, as far as we have noticed, short. All these additions and alterations seem to have been done with great care and judgment, and contribute to maintain the high character of *Chitty on Contracts* as an authority.

Fifteenth Edition. *Stephen's Commentaries on the Laws of England.* 4 vols. Edited by E. Jenks, M.A., B.C.L. London: Butterworth & Co. 1908.

We hardly expected another edition of the *Commentaries* quite so soon after the important departure made by Mr. Jenks when he took up the editorship of the last edition. However, he admits that owing to the "hurried preparation" of the last edition several defects had been overlooked, and hopes for a substantial improvement in the present one. Every year, too, provides fresh materials for incorporation in a work of the scope of *Commentaries on the Laws of England*, and since the last issue, among other Acts, there have been passed the Prevention of Cruelty to Children Act 1904, Trade Marks 1905, Marine Insurance 1906, Merchant Shipping 1906, Workmen's Compensation 1906, Trades Disputes, Territorial Forces 1907, Criminal Appeal 1907, and Patents 1907. No acts passed in 1908 are included in the present edition, so that material is already accumulating for another, in the shape of the Children's Charter 1908. A considerable number of changes have been made in each volume. In Volume I the Conveyancing Acts have been deprived of their special chapter, and Mortgages have been allowed one to themselves. Mr. Jenks is responsible for the greater part of the volume, including the re-written Chapter XXV on the Settled Land Acts; but Mr. J. A. Strahan has revised Chapters XVI, XVIII—XXII, and re-written Chapter XXVI on Registration of Deeds; and Chapter XXVII, on Death Duties on Land, has had the advantage of being re-written by Mr. C. R. Elliott, of the Estate Duty Office. The recent legislation has caused a "severe reformation" of the second volume, particularly in the chapters on "Title by Invention," "Master and Servant," and "Husband and Wife." The first half of this volume, dealing with "rights in private relations," has been revised by Mr. W. M. Gildart. The very long and important chapter on "Title by Contract," which in the last edition was revised and practically re-written by Mr. Gover, has again "undergone thorough revision." The result of all this is unfortunate, inasmuch as it increases the size of the volume by nearly a hundred pages. In the third volume the part dealing with the "Social Economy of the Realm" has been again revised, this time chiefly by Mr. Latter. The volume also contains new chapters on the procedure of the King's Bench and Chancery Division by Mr. R. Dunlop and Master Hughes Onslow respectively. Perhaps

the changes in Vol. VI have been fewer than in any of the other volumes, but the Criminal Appeal Act has had to be considered among other recent Acts. We have only been able to glance at much of the great mass of law contained in these volumes, but among many admirable statements of the law and practice we have noticed a few omissions and slips. The fact of a second Commissioner sitting at the Central Criminal Court is still ignored, nor is the giving in charge alluded to among the incidents of a criminal trial. We think that some allusion to that feature of increasing predominance in Parliamentary procedure, the closure, would be desirable. We have not found any reference to a jury having a view. A curious mistake occurs twice in the Index to Volume VI and that to Volume II, where Prevention of "Consumption" Act (1906) is given instead of Prevention of Corruption Act (1906). We also notice in a few instances that the work has not been brought up to date, as, for instance, in the references to the twenty-second edition of Archbold's *Criminal Pleading*, instead of to the twenty-third. These, however, are small criticisms on such a mass of work.

Present Day Banking. By F. E. STEELE. London: Butterworth & Co. 1909.—Mr. Steele has collected and republished in a small volume a number of notes of lectures, contributions to periodicals, and papers written on bank subjects. They are full of information and suggestions both to the general and professional reader, and although there is not much law in the book, it can be read with interest and profit by all lawyers. There is a chapter on Bankers and the custody of valuables, where, though the doctrine as to how far a banker is responsible for negligence is correctly laid down, he does not touch on the question of responsibility for wrongful conversion. To wide experience of both London and Provincial Banking the Author adds a clear and lively style.

The Companies (Consolidation) Act 1908. By F. EVANS and H. H. KING, LL.B. London: Butterworth & Co. 1909.—The Consolidation Act which came into force on the 1st April 1909 is, for the most part, a consolidation of previous Acts. There are, however, differences in language, and the above-named book comes at an opportune moment. The Authors divide their work into three parts. The first is an epitome of the later history of Company legislation down to the statute of 1908. The Act is set out at length in

Part II, with notes; while Part III is a Comparative Table of old and new Acts. The Case law is sufficiently included, but to avoid over-loading their book the Authors make frequent reference to *Rawlins and Macnaghten on Companies.*

A Practical Guide to the Law of Agricultural Holdings. By J. W. STANTON, M.A. London: Horace Cox. 1909.—The law on this subject has been consolidated by the Agricultural Holdings Act 1908, and, as the Author observes, a fitting opportunity is presented for producing a guide to this branch of the law. As a solicitor and agent for a landed estate Mr. Stanton is well qualified for his task, and we think that his text-book will be of use to those concerned with agricultural leases. The subject is divided into three parts. Part I contains the Act, with notes. Part II deals with the commencement of the tenancy, and contains a form of agreement for a yearly tenancy. Part III deals with the determination of the tenancy, and arbitration. A good deal of very useful incidental information is given—such as the Table of Equivalent Manurial Values on page 78, and suggestions from practical experience. The book is well produced: but typographical errors, such as "kes" for "likes" on page 85, might have been avoided by careful revision.

Butterworths' Workmen's Compensation Cases. Vol. I. (New Series.) Edited by His Honour Judge RUEGG, K.C., and F. J. COLTMAN. London: Butterworth & Co. 1909.—This is a continuation of the nine volumes of Workmen's Compensation Reports edited by the late Mr. Minton-Senhouse. Irish and Scotch decisions are now included among the cases, which run from November, 1907 to May, 1908. There is also an Appendix of Canadian Cases.

Quiet Enjoyment and Title in respect of Landlord and Tenant. By E. A. SWAN. London: Sweet & Maxwell. 1908—The Author deals with his subject under the following heads: Quiet enjoyment generally, and with respect to flats in particular; Assignments—what amount to Covenants or Agreements; Acts in derogation of Grant; Damages for breach of Quiet enjoyment; Title; Investigation of Title; Damages for breach of Covenant or Agreement: Statutes of Limitation. The book appears to be well-written, the principles of the law being clearly set out and illustrated by the cases. A good feature is the inclusion of the references to the cases in the text instead of in foot-notes. The book, we think, can be well recommended.

The Student's Summary of the Law of Contract. By J. G. PEASE and A. M. LATTER. London: Butterworth & Co. 1909.—One might be inclined to doubt whether there is room for another students' guide to the Law of Contract; but Mr. Pease disarms the criticism in his Preface, in which he says that the aim of himself and his collaborator has been to state in concise and comprehensive propositions so much of the leading principles of the Law of Contracts as a student may reasonably be expected to master: and he also expresses the hope that the hand-book may be found useful to supplement the well-known students' books. The work is founded on Mr. Pease's lectures, but he and Mr. Latter have ably evolved it into an excellent treatise on the subject. While there is no especial originality in the treatment of the law, the Authors seem to have dealt with it very thoroughly. The book is divided into articles, with plenty of illustrations to the important principles, and it is excellently printed and produced. The Table of Cases is admirable.

The Criminal Responsibility of Lunatics. By H. OPPENHEIMER, LL.D., M.D. London: Sweet & Maxwell. 1909.—We imagine that the readers of this book will be somewhat limited in number. They will, however, obtain a very comprehensive treatise on a subject which, as the Author says, has for long been debated between doctors and lawyers. The controversy is exhaustively treated, the views on either side being given. We understand Mr. Oppenheimer to be of opinion that, when all is said and done, no grave injustice is occasioned by the English law as it stands, though it is open to improvement. He holds, for instance, that "whilst the most definite proof should be required of the *existence* of mental disease, when once it has been established that the prisoner is a lunatic, the present presumption of the law should be reversed; and it ought to be laid down as a rule of evidence that those proved to be of unsound mind should be assumed, till the contrary be shown, *not* to know the nature and quality of their acts and that that which they were doing was wrong." An interesting feature of the book is the third chapter, which gives the law affecting the subject in all other countries.

A. B. C. Guide to the Companies Acts 1862 to 1907. By H. W. JORDAN. London: Jordan & Sons. 1908.—This will no doubt prove a handy work of reference, and should admirably serve its purpose. It is arranged in alphabetical headings—a method which

to our view requires that the headings should be made with great care. So far as we can judge this has been done, and there is also an efficient Index.

The Annual Digest 1908. By JOHN MEWS. London: Sweet & Maxwell. 1909.—Valuable and indispensable as ever, *Mews* needs little recommendation. While there were few decisions of far-reaching importance in 1908, a great many points were decided. Perhaps *Osborne* v. *Amalgamated Society of Railway Servants*, on the Parliamentary funds of a Trade Union, which has yet to be reviewed by the House of Lords, might be cited as the case likely to have the most important effects. Under "Shipping" and "Master and Servant" (Workmen's Compensation) will be found several weighty decisions. As usual, a selection of Scottish and Irish cases is included.

An Analysis of Williams on the Law of Real Property. By A. M. WILSHERE, LL.B. London: Sweet & Maxwell. 1908.—Mr. Wilshere modestly warns his public that this is merely a note-book. Note-books may be very useful introductions or epitomes, and read before, with, or after *Williams*, this should prove of much service to the student. In a short time it is made possible to him to grasp the outline of this difficult branch of the law. No cases are cited, though statutes are mentioned. A good feature is the Appendix of 100 apposite questions.

Local Taxation Licences. By Sir N. J. HIGHMORE. London: Stevens & Sons. 1908.—The collection of the duties on certain licences has now by the Finance Act 1908 devolved upon the County Councils, and within our knowledge, a certain amount of doubt exists in the mind of their officers as to the new position. As Solicitor for the Customs and ex-Assistant Solicitor of Inland Revenue, the Author is well qualified to write on this subject; and the law affecting the duties on Armorial Bearings, Carriages, Male Servants, Dogs, Guns, &c., will be found clearly set forth. The various sections dealing with the several matters are collected and furnished with sufficient notes which give both law and practice (*e.g.*, the Author notes that in practice a male servant's licence has not been required in respect of a servant employed to drive a motor car which is not chargeable with licence duty as a carriage). The Index and Table of Cases seem to be well done, and the book should be useful.

The Weights and Measures Acts 1878 to 1904. By J. D. FLETCHER. London: Sherratt & Hughes. 1908.—This book is very well turned out. The arrangement of types is especially good. Only those sections of the Weights and Measures Acts which regulate the use and possession of weights and measures for trade are included, the others, together with many of the other Acts referring to the subject being, as the Author observes, more suited to a book on local government. The Author has followed the order of the Act of 1878, and has conveniently attached other sections and schedules to any section upon which they bear. There are copious and useful notes. The law as it affects Ireland and Scotland is also included. The Index and Table of Cases seem to leave nothing to be desired.

Butterworths' Yearly Digest for 1908. Edited by G. R. HILL and H. CLOVER. London: Butterworth & Co. 1909.—This is the first annual supplement to Messrs. Butterworth's very useful *Ten Years' Digest.* The same system of classification as adopted in that work is followed. The same system of cross-references has also been employed. All the Case law for 1908 is included. We are glad to see that the *Times Law Reports* have been included in the *Digest*, as we consider that these Reports are valuable; and at the same time it is very often extremely difficult to hit upon the references to cases which are reported in the *Times Law Reports* only. With regard to Patents, Design, Trade Mark, and other similar cases, a selection only of the cases is included.

Law relating to the Public Trustee and of the Practice in the Department. By L. J. FULTON, M.A., B.C.L. London: Butter worth & Co. 1908.—Now that the business of the Public Trustee's Department has been in operation for a complete year, it is of great practical utility to see how the wheels of the machine work. To assist solicitors and others whose duties bring them into touch with the Department, this little work has been produced by Mr. Fulton, who is fully competent to perform the task, being himself a solicitor under the Public Trustee, whose critical eye has been cast through the proof-sheets. The main provisions of the Public Trustee Act 1906 have been carefully analysed, and in this form a lucid and concise summary of the powers and duties of that official has been presented to the reader. In the first Appendix are gathered the powers relating to the administration of the property of a convict under the

Forfeiture Act 1870. In the second Appendix is given the full text of the Public Trustee Act 1906. The third Appendix contains all the necessary forms and precedents in every-day use, together with a scale of capital fees payable on acceptance. The reader will find such intricate subjects as the transfer of Securities, custodian Trustee, and the investigation and audit of Trust accounts, together with many others, dealt with in a popular and simple manner. The efforts of the learned Author will undoubtedly be received with great appreciation in a wide circle of readers.

Popular Government. By Sir HENRY MAINE. London: John Murray. 1909.—Although in no sense of the word a legal work, these essays, coming from the pen of so eminent a jurist as the late Sir Henry Maine, merit more than a brief notice. In the first one the learned Author treats of the Prospects of Popular Government. Taking as his themes (a) "the ruler is the agent and servant, and the subject the wise and good master who is obliged to delegate his power to the so-called ruler, because being a multitude he cannot use it himself," (b) "Governments serve the community," he works out the history of English and Continental Governments. This essay is, in our opinion, far and away the best in the book, and in these days when the want of "clear thinking" is so obvious, it is an intellectual treat to read so much clear thought, even though it be somewhat conservative in its tendency. The nature of Democracy is the subject of the second essay, which commences with an enthusiastic eulogy on John Austin, at which few lawyers will cavil. One can almost see the hand of the writer involuntarily penning a note of interrogation after the phrase "The Age of Progress," which forms the text for the third essay, as here is so clearly indicated the personal opinion of the Author that it is not always necessary for the Legislature to legislate in order to justify its existence. *Quot homines tot sententiæ* will be the verdict of those who do not see eye to eye with Sir Henry Maine in his unstinted praise of the Constitution of the United States, the subject of the fourth essay. A better stimulus to the student of popular forms of Government, it would be hard to conceive, and for the thoughtful politician there will be plenty of food for reflection contained between the two covers of this able addition to philosophic politics.

The Children Act 1908. By W. CLARKE HALL and A. H. F. PRETTY. London: Stevens & Sons. 1909.—This is really a third edition

of Mr. Clarke Hall's *Law Relating to Children*, but the passing of the Children Act 1908 necessitated the re-writing of that work, and so the name has been changed. The present edition is mainly made up of the recent Act with notes. It also contains the text of the statutes and sections of statutes contained in the Schedule. We have particularly noticed a very convenient Table showing the offences referred to in the first Schedule. There are also sections of various other Acts referring to children, and some forms. The notes are mostly short, but that to sect. 12, "Punishment for cruelty to children and young persons," is an exception, covering about 14 pages. In every case where a change in the law is made by the Act attention is called to it. It is worth the while of draftsmen to consider the suggestion thrown out, that in order to make use of the power of convicting of cruelty where a person is indicted for manslaughter, "in strictness the indictment for manslaughter should however contain an averment that the accused is over the age of sixteen and the child under that age, and that the accused had the custody, charge, or care of the child."

Second Edition. *A Digest of Licensing Cases.* By W. MACKENZIE, M.A., and H. D. WOODCOCK. London: Butterworth & Co. 1909.—We have always found specialised digests useful; and that before us is a good example. Wisely, we think, the Authors have altered their scheme, and instead of classifying the cases under the various headings, now give them in chronological order, assisting the reader by an excellent Index, and also (a commendable feature) a Table of Cases grouped according to subject-matter. All the important decisions appear to be included. A good point is the reference after most of the head-notes to the relevant passage in *Paterson's Licensing Acts.* The accompanying Table of Cases and Statutes is well and fully done. Without wishing to be hypercritical we think that the present Lord Chief Justice should be described as Lord Alverstone, C.J., and not as Alverstone, C.J. Possibly Alverstone, L.C.J., might be a correct compromise.

Second Edition. *The Law of Carriage by Railway.* By HENRY W. DISNEY. London: Stevens & Sons. 1909.—This book, originally intended only for students, and as a handbook to "enable railway men to gain some knowledge of the law governing the ordinary relationship between the carrier and his customer," has in

the present edition been adapted to the use of the legal profession by the citation of a number of additional cases. Chapters have also been added on Rates, Facilities and Preference. An addition to the Appendix has also been made in the form of General Conditions and Bye-Laws and Regulations. The first Part deals with Carriage of Goods; the second with Carriage of Persons; and the third with the above-mentioned Facilities and Preference. Mr. Disney has, we think, followed a judicious course in not citing too many cases, and in treating with some fulness those he does cite, and he deals with his subject throughout with broad common-sense, as for instance, the manner in which he treats the liability of railway companies to persons on their premises other than passengers. We might also call attention to the short but practical summing up of the result of the cases where passengers' fingers have been squeezed in the door.

Third Edition. *The Arts of Writing, Reading, and Speaking.* By E. W. Cox. London: Horace Cox. 1909.—Mr. Serjeant Cox was in his day a celebrity, and the manual named above obtained so far back as 1878 a popularity which no doubt warrants the present reprint. We are somewhat sceptical as to the ability of anyone to lay down hard and fast rules for reading and speaking, to which a large portion of these letters is devoted, nevertheless we are far from saying that the book is not of use: we think that to many it may be of much use, as it has evidently been in the past. It is eminently readable, and contains much of interest, and it may at all events be urged that the Author had clearly found helpful to himself the rules and principles which he has handed down to others.

Fourth Edition. *The Agricultural Holdings Act 1908.* By A. J. Spencer. London: Stevens & Sons. 1909.—The Land Tenure Bill, which ultimately emerged as the Agricultural Holdings Act 1906, was in its early stages stigmatised as a piece of class legislation, calculated to stir up strife between landlord and tenant. Chastened in Committee, and by the Upper House, and finally repealed before coming into operation, it was re-enacted, and now appears as part of the Consolidated Act of which Mr. Spencer writes in the book above named. Later editions of this book will no doubt be necessarily larger, but Mr. Spencer has furnished ample notes to the law as it stands, and appears to have included all the important decisions. The necessary forms and rules and a good Table of Cases has been added.

CONTEMPORARY FOREIGN LITERATURE.

Summarisches Strafverfahren in England und Strafverfahren in Schottland. By Drs. Jur. P. LIEPMANN and W. MANNHARDT. Berlin: 1908.

German jurists are at present much occupied with reform of criminal procedure. This work is one of the *Beiträge zur Reform der Strafprozesses* devoted to that object. It follows immediately upon a volume dealing with the English police system. The present volume is carefully compiled, and will enable an English lawyer to see how our process of summary jurisdiction strikes a German. Some points, the learned Authors think, may be well imitated from us, in others the Germans have the best of it. For instance, the *Mandatsverfahren* of Germany and Austria does not exist in England. The List of Authorities is a good one, most of the main English and Scottish ones being cited, in addition to two or three which can hardly be considered in the front rank. The Authors are up to date, they know the Probation Officer and they give the main provisions of the Children's Bill, which had not become law at the time when this book was published, early in 1908. No decisions are cited.

Il Sentimento Giuridico. (Second Ed.) By Prof. G. DEL VECCHIO. Rome: 1908.—The first edition has already been noticed in the *Law Magazine and Review.* The conclusion at which Prof. Vecchio arrives might be accepted by an English jurist if he could understand it, viz., that the sentiment of justice is the anthropological exigence of law.

PERIODICALS.

Journal du Droit International Privé. Nos. I—IV, 1909. Paris. —These numbers are full of valuable articles and decisions, of which space will allow but a small selection. Of articles may be named *Les Associations Érotiques en Russie* (p. 74), one on extradition by Mr. W. F. Craies (p. 378), and *La Nouvelle Cour d'Appel Criminelle en Angleterre* (p. 439). A curious decision is that at p. 259, where the Supreme Court refused to acknowledge Alfonso Sanz as the natural son of Alfonso XII, laying down the principle that a claim of affiliation must be supported by evidence stronger than that in ordinary cases when the reputed father is a king. The Areopagus

on appeal from Patras refused validity to the claim of an exclusive right of fishery around Cape Actium, on the ground that the sea is a *res communis* (p. 263). A Swiss decision of immense length on extradition is in practical agreement with our King's Bench Division in the case of *Re Castioni* (p. 281). The Supreme Court of Vienna held that if a guest places his clothes outside his door to be brushed, the proprietor of the hotel is liable if they are stolen (p. 530). Thirty lady-advocates (*avocates*) have been admitted to the bar in Bavaria. This, says the writer, is a number far in advance of that of Paris, where there have only been ten admissions in as many years. No wonder, says he, for there are 2,000 advocates in Paris and 200 would be ample for the work required.

Annuaire de la Législation du Travail. Brussels: 1908.—This valuable annual digest of labour legislation (including old age pensions) is published by the Belgian Office of Labour, and includes the main laws on the subject passed in 1907. Several Acts and Orders in Council relating to the United Kingdom and the colonies fill as much as 265 out of 943 pages. At p. 309 will be found a decree allowing trades unions in Brazil. Chile (p. 312), Italy (p. 813), and Portugal (p. 873), have all passed laws for the observance of a weekly day of rest. The differences between the laws of the different countries are interesting. For instance, Italy and Portugal except from the law theatrical performers and employés of the theatre, Chile does not. In certain cases a day other than Sunday may be ordered by the central or local authority. The principal of a day of rest also occurs in Roumania. By the *Lege asupra muncei minoneor* &c. of 24 Feb. 1906, all women and boys under fifteen are entitled to one clear day of rest a week (p. 935).

Deutsche Juristen-Zeitung. 1 Jan.—15 March, 1909. Berlin.—In *Die Lüge in Prozess* Prof. R. Schmidt deals with a matter about which County Court judges in England have often been exercised—the too frequent perjury in Courts of justice (p. 39). Many articles deal with the reform of criminal procedure. Among others is a series of comparative statements of the constitution and practice of criminal Courts in Germany, Austria, France, and England (p. 105 *et seq*). The growing attention paid to comparative legislation is shown by a subsequent article on the way in which various legal systems have dealt with trusts in restraint of trade (p. 347).

Zeitschrift für Internationales Privat—und Offentliches Recht. Vol. XVIII, part 6. Leipsic: 1908.—The legal position of an English joint-stock company in Germany suggests some useful points of law (p. 547). In a report of the rights of an English pauper at Berlin, an English case is cited, a most unusual thing in a German tribunal, but no reference is given except a German text-book. The matter is governed by reciprocity (p. 553). The question of the discharge of an obligation in whole or in part is a question for the Court of the country in which the obligation is to be fulfilled (*Erfüllungsort*, p. 556).

La Giustizia Penale. 14 Jan.—11 March, 1909. Rome.—This periodical, now in its fifteenth year, continues to maintain its high standard in reviewing and reporting. There are several cases on the Weekly Day of Rest Law 1907. In one of them it was held that a barber was not liable for an infraction of the law by opening his shop on Sunday for the purpose of cleaning the implements of his trade (p. 149). There is a rather strange decision to the effect that the game of *morra* is not a game of hazard, although it is classed as such in the schedule to one of the sections of the Penal Code (p. 119). This seems rather like the judicial repeal of an Act of Parliament. A witness called as witness to a fact and later in the trial as an expert need not be sworn a second time (p. 217).

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to want of space:—Wade-Evans' *Welsh Mediæval Law;* Lightwood's *Time Limit on Actions; Every Man's own Lawyer;* Holdsworth's *History of English Law, Vols. II & III;* Hynes & Jameson's *County Council Licences;* Maclean's *Law of Secondary and Preparatory Schools;* Mackenzie & Lushington's *Registration Manual; Stone's Justices' Manual;* Aske's *Custom and Usages of Trade, Butterworths' Quarterly Digest; Thomas' Leading Cases in Constitutional Law.*

Other publications received:—Pratt's *Policy of Licensing Justices* (P. S. King & Son); Pellerin's *French Law of Wills* (Stevens & Sons); *Copyright Law of the United States of America* (Government Printing Office, Washington); *Items of Legal news, April, 1909* (Lawyers' Co-operative Publishing Co., U.S.A.).

THE

LAW MAGAZINE AND REVIEW.

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I.—THE BELIEF IN INNATE RIGHTS.

"THE belief in innate rights," says Professor Dicey, in an article against Women's Suffrage, which appeared in the *Quarterly* for January, 1909, "was expelled from England by the passionate and irresistible reasoning of Burke and the cool and deadly analysis of Bentham."

Had Professor Dicey written, "was expelled from the mind of the jurist," in place of "was expelled from England," the proposition would have called for no remark. But the Professor wrote "England," and it behoves every lover of justice to protest against such a statement.

In *Law and Opinion* Professor Dicey has traced with unerring hand the steady growth of socialist ideas in recent years. With this new mental atmosphere has arisen a school of thought which, although it assumes, with Professor Dicey and John Stuart Mill, that utility is the ethical criterion and human welfare the ethical aim, deduces from these assumptions a line of argument as regards "rights" altogether different from Professor Dicey's.

"The claims to Parliamentary votes as a matter of abstract rights," says Professor Dicey, a little further on in the same article, "is part of an obsolete creed." It would be interesting to know on what other philosophical ground any one could claim a vote since legal philosophers could not be so illogical as to contend that anything may be

"right" in theory and not in practice, or *vice versâ*. But, suppressing such curiosity, there are many persons in England to-day ready to defend the belief that political loyalty to the supremacy of "Abstract Right," so far from being obsolete, remains the only possible guide and curb to the inevitable and fast approaching reign of a complete democracy. The political belief in "Abstract Right" constitutes the only court of appeal there is against democratic oppression and injustice.

Professor Dicey's words carry weight, since he is acknowledged to be one of the most eminent of living jurists, and the serious nature of his contention that the political belief in "innate rights" and "abstract right" is obsolete furnishes the excuse for the following essay, which is nothing but a recapitulation of self-evident truths, truths which refute the foregoing quotations from the *Quarterly*.

The modern theory of "rights," postulates utilitarian principles and may be summarised somewhat as follows:—

Bentham describes the word "rights," as the most ambiguous in the English language. But a careful analysis of the adjective "right," the abstract noun "right" and the term "a right," dispels its ambiguity and places Bentham's immortal legal-philosophy on a sounder basis than the weak and careless framework on which he raised it himself. Following the maxim that we must seek the meaning of the universal in the particular, we must begin by considering the word "right" in its adjectival and adverbial form.

Derived from the Latin *rectus*, straight, the word "right," from constant metaphorical use, gradually acquired many significations, such as goodness, correctness, truth, etc.

An action was "right" if it was thought good. A method was "right" if it was successful in achieving the desired end. The solution of a problem was "right" if it proved correct. A proposition was "right" if it was true. But

since far the most frequent use of the word "right" was for judging the moral value of men's actions, and since some system of morality is the *sine quâ non* of society, the adjective "right" has, of necessity, come to have chiefly a moral significance. It usually means good.

Little by little, through much tribulation and despair, men have noted that which makes for their good and they have called it "right," and that which injures them and they have called it "wrong." Broadly speaking, therefore, the adjective "right" signifies the attribute of being for the benefit of humanity, and the adjective "wrong" the reverse. If this definition be correct, "right" and "wrong" are no mere juggle of words, as in pessimistic mood we are inclined to believe. No matter how often in ignorance and prejudice men have misapplied the terms, there remain a positive and actual "right" and a positive "wrong," just as, in the same way, no matter how often a child makes a mistake in an addition sum and insists that two and two make five, it in no way alters the fact that two and two make four. The word "right" postulates as immutable relations between men as the word mathematics postulates between quantities and between magnitudes.

The adjective "right" in its usual, *i.e.*, its moral sense, signifies the attribute peculiar to those relations between men which further the welfare of humanity. Thus, "honesty," is a relation of men to each other which furthers human welfare, hence "honesty" is "right." Again, "justice" is a relation between men acknowledged by all to be essential to society, hence "justice" is "right." There is no action which can be described as "right" which does not, on examination, prove to be "right" only because it is a relation of men which benefits humanity. The difficulty, as everyone knows, does not consist in defining the meaning of "right," as to which most of us are agreed, but in pronouncing which relations of men are "right," and which "wrong," matters in which few of us agree.

The adjective "right" may be defined therefore as the attribute peculiar to those relations between men which further the welfare of humanity.

2. Turning now to the universal. The abstract noun "right" is derived from the adjective "right," just as goodness is derived from good, and whiteness from white. We should use the word "rightness" to signify "abstract right," and were this always done much confusion of thought would thereby be avoided. Unfortunately custom has ordained otherwise. "Abstract right," or, more correctly, "rightness," it is hardly necessary to add, is the name for the attribute connoted by the adjective "right," when considered apart from any object. It is the name for the attribute, peculiar to certain relations of men, of furthering the general welfare.

3. In defining the term "a right" we return from the universal to the particular. "A right" is an abbreviation of the adverbial phrase "it is right that." For example, the phrases "All men have a right to justice," and "I have a right to liberty," are merely more concise ways of saying, "It is right that all men should have justice," "It is right that I should have liberty."

Hence "a right" may be defined as "a claim to some particular thing on the ground that the claim is founded on a relation between men which has the attribute of rightness."

To illustrate the meaning of this definition:—A. owes B. £20 for goods supplied to him. Few question that it is right (*i. e.*, a relation between men furthering human welfare) that men should pay their just debts, hence B. has "a right" to £20 from A. because his claim to that sum is founded on a relation between men which has the attribute of rightness.

Granting that the foregoing analysis is correct, the term "a right" implies that a given relation has a necessary result, just as the term "a logarithm" implies that a given

relation has a necessary result. "Rights" being the name for all claims founded on certain relations between men which have a particular, necessary and definite result, are as inherent in the nature of things as are the relations of geometry or physics. Bentham and Burke could expel the belief in "innate rights," but they could no more expel innate rights themselves, than they could expel the axioms of geometry, and it follows also that the theory of natural law was raised on a basis of solid truth, and only the ambiguity arising from a confusion between the scientific and the legal signification of the word "law" can explain the contempt with which some persons treat the term "natural law" and its derivative "natural rights," a contempt which is truly astonishing.

Now jurists do not admit the truth of the theory of rights described above. They hold that rights are *created by sanctions and cannot exist apart from their sanctions.* They defined legal rights as "rights created and sanctioned by law," and they further maintain that there are no "rights," properly speaking, sane "legal rights," since all other "rights," moral, natural and innate, are metaphors and nothing else. This doubtless is to what Professor Dicey is alluding when he writes, that since the time of Bentham the belief in innate rights is obsolete. This view of "rights" postulates that men, jurists, can create justice and truth and can demolish them at will. So monstrous a claim should not pass unnoticed. Let us therefore criticise the jurists' definition of legal rights, "rights *created* and sanctioned by law."

In the first place, "rights" is an abstract term. Politics (which includes the science of rights) is an abstract science, since it deals with the attributes of society (*i.e.*, relations of men), considered apart from society; just as mathematics is an abstract science, since it deals with relations of numbers, for numbers are not things but attributes of

things. "Rights" are attributes of society, and "a right" is as abstract a term as "an improper fraction."

It may be objected that this analogy is erroneous, for many hold that the relations of men cannot be considered apart from men, in the way that numbers can be considered apart from things, and that, therefore, politics cannot be an abstract science. But how can it be maintained that the proverb "Honesty is the best policy" is not as abstract a proposition as that "a proper fraction is one whose numerator is less than its denominator"? The term "honesty" is surely an attribute of society considered apart from society.

The term "a right," although an abstract term, may be used in reference to concrete things, just as the term "a quadratic equation," although an abstract term, may be used to solve a concrete problem; and it can no more be contended that "rights" cannot be an abstract term since it is often used in connection with roads and property, than it can be contended that "a vulgar fraction" is not an abstract term because it may be used in connection with a grocer's accounts.

The relations of men are seldom considered in the abstract, but to deny therefore that politics is, or ought to be, an abstract science is as though the savage counting his toes, were to deny the possibility of considering the relations of numbers apart from toes, or in other words, to deny that mathematics was an abstract science.

The full significance of this, apparently superfluous, metaphysical digression as to the abstract nature of the term "rights" becomes apparent when we reflect on what its truth involves. If the term "rights" is an abstract term, denoting particular relations that have a necessary consequence, "rights" cannot be *created* by any human agency. The most that the law can do is to define, *classify*, and sanction "rights": it can no more create "a right" than

it can create an axiom of mathematics. Were the law to attempt to create an axiom of mathematics, by decreeing that henceforth two and two are to make five, the decree doubtless might be enforced on accountants at the cost of distracting business complications and no little injustice. Yet, in spite of the law and subservient clerks, two and two would still make four and not five. And in the same way with "a right." A given relation between men must have as necessary a result as a given relation between numbers. Those relations which have a beneficial result to society are "rights," whether enforced by law or not, and those relations which have an evil result are not "rights," though they may be legal and sanctioned by all the terrors of the most powerful law conceivable.

Wherever the law has sanctioned a genuine right it has furthered the welfare of humanity. Wherever it has attempted to *create* "a right," by labelling some relation of men "a legal right," which was not "a right" independently of law, it has thereby wrought unmitigated evil

Our law sanctions the right of every man to be protected from slander, robbery and murder: it sanctions the right of accused persons to a speedy trial. Inasmuch as these rights are unquestionably essential conditions of human welfare it is evident that they exist independently of law, although it is equally evident that by enforcing these rights law confers a benefit on us all, But in France, before the Revolution, the law did not sanction these "rights." It preferred to create "rights." That is, it sanctioned powers and privileges for the aristocracy and the clergy which, *apart from law*, were not rights, and labelled these, its iniquitous creations, "legal rights." Much the same may be said of Russia at the present day. What has been the result in both cases? The "legal rights" of the French church and the French nobility reduced France to starvation and a bloody revolution. The "legal rights" of

the Russian bureaucracy are reducing Russia to ruin and anarchy.

Professor Holland contends that "it causes great confusion to imagine any connection between a 'legal right' and the abstract term 'right,' or the eulogistic adjective 'right.'" It certainly does. Yet the fact remains that the connection is anything but imaginary. Sir Henry Maine has pointed out that the origin of "legal rights" was the judgments of those in authority as to what was right. "Legal rights," being derived from moral conceptions of right, it follows that, whenever, as frequently happened, those moral conceptions were erroneous, the term "legal rights," when applied to the so-called "rights" derived from those moral conceptions, was metaphorical. Whenever the term "legal right" has been, or is, used to cover some "wrong" sanctioned by law, it has been, or is, a metaphor and nothing else. Therefore, contrary to the teaching of jurists, it is precisely "legal rights" that are more frequently "metaphorical" than any other.

"The ultimate object of law," says Professor Holland, "is no doubt nothing less than the well-being of society," and, although the cynic may smile, it is satisfactory to think that those worthy of the legal profession acknowledge such an aim. But if there is any truth in history, once we admit this exalted aim to be the ultimate object of law, we are forced to admit that the immediate object of law is the *classification* and protection of rights, and not, as Professor Holland and other jurists teach, the *creation* and protection of rights. It is of course open to jurists to contend that lawyers, *qua* lawyers, are obliged, if they are to fulfil their professional duties, to assume that "legal rights" are the only genuine "rights," and if they assume this they must further assume that the law can create "rights." And as long as jurists define "legal rights" as they do, for legal purposes only, law being what it is now, no one could

quarrel with them. But when jurists apply their legal definitions to the decision of matters beyond their own system of law, as for instance, when Professor Dicey summarily dismisses a claim urged on behalf of a large section of the community by the assertion that there are no such things as "innate rights," then it is time for the public to rebel, and to point out that legal formulas are often nothing but fictions necessary to justify the imperfections of legal principles.

A knowledge of all the bitter sorrow and care and misery still caused by legal injustice, makes it the duty of every responsible adult to do all that lies in their power to urge the necessity of legal reform, and legal reform will never be completed until such time as genuine "rights" only are legally recognized, and it thus becomes possible to adequately and truthfully define legal rights as "those rights which are sanctioned by law."

It is foreign to our purpose to discuss here the meaning of the terms "natural" and "moral rights," beyond observing that such classifications are, like the term "legal rights," distinctions drawn between the sanctions which enforce "rights," and are not distinctions between "rights" themselves.

The whole object of this inquiry has been to make clear one cardinal point, and that is that "*Rights exist independently of any sanction.*" The terms "innate and abstract rights" embody this truth, for they are used in antithesis to such terms as "moral or legal rights," to signify all the innumerable rights which are not sanctioned by law, public opinion, religion, or anything else.

Men had "a right" to freedom in the days of slavery, just as much as they have now, although in those days, that "right" had no sanction for slaves, either moral, natural or legal. "Rights," being claims founded on the necessary result of given relations between men, are "rights" whether those claims be enforced or not.

I may seem to have somewhat unnecessarily laboured the question as to whether "rights" are, as jurists maintain, created by their respective sanctions; but it is a matter of profound and far-reaching importance. If rights are created by their sanction, then *there can be no such thing as "a right"* which is not sanctioned either by law or some other agency, and if legal rights are nothing but the arbitrary creation of the sovereign political power, it follows that the whole case for justice to any class whatever which cannot secure it by force falls to the ground.

If there is no such thing as an "innate right," what meaning have the words justice and injustice? Even a jurist could not maintain that "just and unjust" are synonymous with the words "legal and illegal."

"Vous avez la foi, Monsieur, à quoi nous sert-elle?" says one of the characters in a novel by Anatole France.

"A pécher, Madame," is the reply.

Not to believe in sin is the lowest depth of the scepticism which turns everything into ashes, and the soul of a community is the same as the soul of an individual. Woe betide the nation whose political creed leaves it bereft of a sense of political sin, for hard will be the lot of the oppressed under rulers who deny allegiance to the sovereignty of Abstract Right.

H. FRANCES PETERSEN.

II.—COUNSEL'S FEES.

IN the recent case of *Sadd* v. *Griffin*[1] the Court of Appeal decided that for the purpose of taxation of a solicitor's bill of costs, under the Solicitors Act 1843, "disbursements" means actual payments before delivery of the bill, and that consequently any sum claimed as disbursements, *e.g.*, fees

[1] L. R. [1908], 2 K. B. 510.

to Counsel, which have not in fact been paid before delivery, must be disallowed. In this case Counsel's fees amounting to £54 : 6*s*. 6*d*. had not been paid when the bill was delivered before action brought or when the order for taxation was made. The taxation was adjourned in order to give the solicitor an opportunity of paying them, which he did, but the Court of Appeal nevertheless held that they must be disallowed. "It is necessary in the interests of honesty, and in order to remove temptation," said Farwell, L.J., in delivering the judgment of the Court, "that all disbursements should be made before the bill is paid, and it is equally necessary if an action is to be brought."

Thus the rule laid down by Parker, B., that an attorney cannot charge for Counsel's fees which have not been paid was upheld.

Under the new Regulations which came into force on May 1st an attempt has been made to evade the natural consequences of this decision.[1]

These Regulations provide that in taxation under the Act of 1843, provided the solicitor sets out in a separate column of his bill the unpaid items, and expressly states that they are unpaid, such items may be allowed by the Taxing Master if they are actually paid *before the bill is lodged*, and are made in discharge of an antecedent liability of the solicitor (including Counsel's fees) properly incurred on behalf of the client.

And where the proceedings for taxation are commenced by the client or a third party, payments made by the solicitor *pending* such proceedings in discharge of any such antecedent liability so set out in the bill (including Counsel's fees), may be allowed by the Taxing Master if it appears to him that such payments have been properly made and that no injustice is done thereby.

By these Regulations it will be seen that the intentions

[1] Order LXV, Rule 27, Regulation 29a.

of the Legislature and the decision of the Court upon the interpretation of the statute have been largely disregarded. The credit system which the statute was designed to check, has received official sanction.

The theory that the services of Counsel are gratuitous, which has prevailed throughout Western Europe, may be traced to the practice of Republican Rome. In these early days the Bar was the road to office, and since the advocates were usually men of wealth and position, pecuniary reward was viewed with indifference and rejected as degrading. With the Empire, however, office had lost its inducements both from a pecuniary and a political point of view. The profession of advocacy began to be followed for the sake of its emoluments, and although the old theory survived as a tradition, the scale of fees was carefully regulated by law. And apparently they could be recovered when earned.[1] But if an advocate failed to appear to plead a cause for which he had accepted a fee he was bound to return it, if the absence was due to his own fault[2] but not otherwise.[3]

When the theory of gratuitous payment was first introduced into this country we do not know. It certainly formed no part of the old Common law. The earliest known instance of fees to Counsel appears to be that of those paid in the celebrated case of *Anesty* v. *Mabel de Franchville* in 1158. But these fees are given in the aggregate for services spread over many years, months or days, and are only interesting as showing that they were paid at the time, the money being borrowed by the plaintiff from the Jews. The recognised fee to Counsel for appearing in Court was an angel, *i.e.*, *3s. 4d.* One of the earliest instances with which I have met occurs in the account roll of John le Gaunter, Common Clerk of Hereford for the year 1287, viz.: "*lib. dvobus attornatoribus coram domino*

[1] *Dig.*, 50, 13, 1, 13. [2] *Cod.*, 4, 6, 11. [3] *Dig.*, 19. 2, 38, 1.

R. de Hyngham pro communitat, versus episcopum decanum et capitalum VI s. VIII d." The same amount was paid to William Paston and John Martyn for their "good counsel" in 1419, neither of whom at this date were Serjeants.

From the bill sent in to the city treasurer by the Mayor and Aldermen of Canterbury after a visit to London in the year 1500, we derive a good idea of the manner in which and the amount of the fees paid to Counsel and of the relationship between Counsel and the lay client. The first item is 10*s.* paid to Mr. Frewick, Mr. Kingsmill and Mr. Holton, Counsel, at Serjeants' Inn. On the same afternoon the city representatives saw Mr. Holton, the junior Counsel, in the cloister at St. Paul's, where he corrected a copy of some document, for which he received 3*s.* 4*d.* and his clerk 12*d.* On the following morning 3*s.* 4*d.* was paid to each of the three Counsel in Westminster Hall. These fees were repeated on the three subsequent days.

For the examination of sixteen witnesses in the Star Chamber a fee of 3*s.* 4*d.* a head was paid to Mr. Roydon. After a day's interval fees were again paid to two of the Counsel and a breakfast given to Sir Matthew Browne. Then as now Counsel had their country houses. Messengers were frequently sent across Tilbury Ferry to "Maister Raimond" who had been retained "to be our counsell" at a fee of 3*s.* 4*d.* Master Frewick lived at Finchley, his clients more than once going to see him there. Meeting the Recorder of London on his way to the Temple, the Mayor and Aldermen "besought hym to be good maister to the citie and retaigned hym . . . . 6*s.* 8*d.* and for his servants brekefast in Flete Street . . . . 11*d.* The Recorder, however, was busy, and having kept his clients hanging about the Guildhall all day, it required the payment of another 6*s.* 8*d.* to induce him to attend to the matter. Accordingly, next morning at the Temple, the Recorder having "contrived the bill and corrected it," received another 6*s.* 8*d.* for his reward.

Master Mordaunt, another Counsel, received as a present a pike purchased at the expense of 3*s.* 4*d.*

The earliest instance of a retainer of Counsel by deed would appear to be that of Parnynge, afterwards Edward III's Chancellor, whilst still an apprentice-at-law. It took the form of an annuity of two marks per annum, together with "a robe suitable for wear among esquires" at Christmas, for advice and services given and to be given to the grantor, John de Haverington, during the grantor's life, against all persons except the king. The indenture is dated Wednesday after the Feast of Easter, 1325.

This form of retainer was evidently quite common. Serjeant Manning cites that given to Serjeant Yaxley dated 16th July, 1501. For undertaking to attend the assizes at York, Nottingham and Derby, and there being "of council with Sir Robert Plompton," the Serjeant was to receive 40 marks, of which £5 was acknowledged as received. In addition Sir Robert agreed to pay "the charges of the said John Yaxley as well at York as at Nottingham and Derby."

Clearly a breach of any of the conditions contained in such indentures constituted a good cause of action. But apart from a contract under seal, did an action of debt lie upon a promise to pay Counsel his fees for services rendered? There can be little doubt that it did. Thus, in 1275, in the Fair Court of St. Ives, Serjeant William of Bolton successfully sues for fees for services rendered as Counsel in litigation in this Court;[1] and in 3 Henry VI we find a Serjeant bringing a writ of debt and declaring that he had been retained as Counsel for the defendant for two years, taking by the year £10. The judges decided against the Serjeant, apparently upon the ground that he was not compellable to be of Counsel to anyone for a time certain. But if, since he was bound to attend the Court of Common Pleas and to be Counsel to any

[1] Pleas in Manorial Courts, ed. Maitland, pp. 155, 159, 160.

requiring his services in a particular cause, he had brought his action of debt for services rendered in a particular cause, the action would have lain.

And in *Marsh and Rainsford's Case*, decided in the King's Bench in 1588, we find Chief Justice Wrey laying down the following proposition as good law: "If one cometh to a Serjeant-at-Law to have his Counsel, and the Serjeant doth advise him, and afterwards the client, in consideration of such Counsel, promiseth to pay him £20, an action lieth for it. And so Popham said, it had been adjudged in the exchequer: and it is the common practice in this Court."[1] With the right to bring an action for his fees, we should naturally expect to find Counsel liable to an action for negligence. The evidence of this liability, if not abundant, appears none the less to clearly establish such liability.

Thus in 1433 we have an account of an action brought by one Somerton against a barrister whom he had retained in the purchase of a manor. Counsel had played false and purchased the manor for another. It was held that an action on the case lay.[2] In *Doige's Case*, 1442, the facts were similar. Stokes, apprentice-at-law, arguing the case in the King's Bench, said, "Suppose I retain one who is learned in the law—Apris del Ley—to be of Counsel with me in the Guildhall at a certain day: at which day he does not come, whereby my matter is lost, now he is chargeable to me in action of deceit."[3] This proposition is cited as good law by Chief Justice Rolle, and six years earlier it had been expressly decided that where a Serjeant had undertaken to plead and failed to do so, or pleaded other than according to his instructions, he was liable in damages to the person who had retained him.[4] According to Bereford, C.J., if Counsel even advised some business, knowing it to be

[1] 2 Leon. 111.

[2] *Year Book*, 2 Hen. VI, fo. 18.

[3] *Year Book*, 20 Hen. VI, fo. 34.

[4] *Ibid.*, 14 Hen. VI, fo. 58.

illegal, he was liable to an action of deceit.[1] And the rule of Imperial Rome, that if Counsel failed to attend he ought to return his fee was upheld in 1467, when it was decided that if Counsel were retained at a certain sum and did not attend, the client was entitled to bring an action against him for the recovery of the fee.[2] This rule appears in the *Mirror of Justices*, and was held to be good law in the reign of James I.[3]

And in Chancery, as late at 1754, Lord Chancellor Hardwicke laid down the proposition that where a decree was made by consent of Counsel and without the consent of the client, there was no right to appeal or rehearing, but the remedy was against Counsel himself.[4] In a similar and earlier case before the House of Lords, the appellant was desired to bring his action against Counsel.[5]

Sir John Davies, Attorney-General to James I in Ireland, appears to have been the first to have introduced the Imperial theory of an *honorarium* into this country. In the preface to his Report, published in 1628, he writes of the professors of the law "for the fees or rewards which they receive are not of the nature of wages or pay, or that which we call salary or hire, which are indeed duties certain and grow due by contract for labour or service, but that which is given to a learned Councillor is called *honorarium*, and not *merces*, being indeed a gift which giveth honour as well to the taker as to the giver; neither is it certain or contracted for, no price or rate can be set upon Counsel, which is invaluable and inestimable."

Obviously Sir John had been reading Quintilian's *Orations*, written in the middle of the first century, in which he discusses the theory of gratuitous services, contending that although one possessed of a sufficient competency ought

1 *Year Book*, Edw. II, 1310, Vol. III, 196. Seld. Soc.

2 *Ibid.*, 7 Edw. IV, 14.

3 *Broke* v. *Montague*, Cro. Jac. 90.

4 *Bradish* v. *Gee*, Ambler, 229.

5 *Harrison* v. *Rumsey*, 2 Ver. Sin. 488.

not to make a trade of his profession, yet one constrained to earn his livelihood need not refuse to accept pecuniary rewards. "A virtuous advocate therefore," he concludes, "will not seek to get more than is sufficient for him, and even one, whose poverty obliges him to receive fees, will not take them as a debt due to him, but receive them as an acknowledgment; being well aware that the obligation is still on his side. For in truth the services of Counsel ought not to be sold, nor, on the other hand, go unrewarded." When Quintilian wrote, the Roman Bar was passing through a transitional period, and the writer was endeavouring to reconcile modern practice with ancient custom.

Davies's view was expressly adopted by Blackstone, who wrote in 1763; "Counsel's fees were given to him, not as *locatio vel conductio*, but as *quiddam honorarium;* not as salary or hire, but as a mere gratuity which a Counsellor cannot demand without doing wrong to his reputation." He then proceeds to quote the passage from Tacitus which recites the decree of the Senate, limiting the *honorarium* to ten thousand sesterces, "or about £80 of English money,"[1] quite oblivious of the change which at this date had taken place at the Roman Bar.

The influence of the new learning introduced by Blackstone speedily made itself felt in the Courts. It was held in 1791 that no action lay against Counsel for negligence,[2] and in the following year, in an action to recover a fee paid to Counsel to argue a cause, which he failed to attend, Lord Kenyon said it was the general opinion of the profession that Counsel's fees "were as a present by the client, and not a payment or hire for their labour," and that it was for Mr. Philipps to decide whether he returned the fee or not.[3]

[1] 3 *Bl. Comm.*, 26: *Tac. Ann.*, 1, 11, 7.
[2] *Fell* v. *Brown*, 1 Peake 131.
[3] *Turner* v. *Philipps*, 1 Peake 166.

The reasons given for this exemption of Counsel from an action for negligence was, that it would be a hardship to subject him to an action at the suit of a client against whom he could not maintain an action for his fee. But as the learned editor of the third edition of Blackstone's *Commentaries* observes, "it is not easy to perceive why the situation of a barrister should differ from that of any other person who undertakes without reward to perform a service for another. Such persons it is clearly settled are liable for gross negligence, and where their situation is such as to imply that they possess skill or knowledge in the matter, the want of it is imputable to them as gross negligence." But however just it may appear that Counsel should be liable for want of professional skill, it has long been felt that in the highest public interests such liability ought not to attach, and it must be remembered that up to the middle of the 18th century much business which is now transacted by solicitors was still in the hands of Counsel, and that too without the intervention of a solicitor.

The theory of a mere *honorarium*, which at the option of the client might be slipped surreptitiously into the hand of a successful advocate, in spite of some decisions and the opinions of modern text-writers, was not even on the bench universally accepted. "It is never expected," said Bayley, J., in *Morris* v. *Hunt*,[1] decided in 1819, "it has never been the practice, and in many instances would be wrong, that Counsel should be gratuitously giving up their time and talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability, and certainly of great integrity and with every qualification which is necessary to adorn the Bar, to exert their talents. It is the emoluments in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health, which a

[1] 1 Chit. 544.

long attendance at the Bar naturally produces; and it is of advantage to the public that they should receive these emoluments which produce integrity and independence; and I know of nothing more likely to destroy that independence and integrity than to deprive them of the honourable reward of their labours."

"Was it ever understood by any man," asked Best, J., in the same case, "that gentlemen who are put to the most enormous expense in rendering themselves competent to appear in a Court of Justice as advocates, are to act for nothing? No man is so ignorant or so stupid as to suppose that this can be the case."

But as Bayley, J., went on to declare it was the duty of Counsel to take care, where they have fees, to see that these are paid upon the delivery of their briefs, and if this duty is neglected or disregarded the law will not afford them any remedy. And the reason for this is, as he explained, that their emoluments should not depend upon the success or failure of the cause, but should be equally the same, whether they were successful or unsuccessful. In this way, and in this way only, could their independence and integrity be maintained. This declaration is in conformity with the practice at the Bar at this period and for many years subsequently.

In the Inner Temple Library may be seen a highly-polished wooden bowl which was used by Baron Martin when at the Bar, from 1830 to 1850, for the reception of his fees, which were then paid in cash with the brief. Earlier still we have Roger North's account of his brother's emoluments when Attorney-General. In a drawer lay three skull caps: "One had the gold, another the crowns and half-crowns, and another the smaller money."

The case of *Veitch* v. *Russell*,[1] tried in 1842, may be mentioned here as showing the opinion of the judges at this period. This was the case of a physician suing for his fees.

[1] 13 C. B. (N. S.) 677; 9 L. T. 736.

It was held that where there was an actual contract, the onus of proving which rested on the physician, he was entitled to sue.

"It must be assumed as clear," said Lord Denman, C.J., "that physicians and Counsel usually perform their duties without having a legal title to remuneration. Such has been the general understanding. To prevent that from operating, some express agreement must be shown." "I am of the same opinion," said Coleridge, J. "To support such an action as this there must be, not indeed an express contract, but an actual contract."

Whatever doubts still existed as to Counsel's right to recover his fees, was settled once and for all by the decision of the Exchequer Chamber in *Kennedy* v. *Brown* in 1863.[1] The distinction was taken between fees agreed to be paid for advocacy in litigation and for non-contentious business. "We consider," said the Court, "that a promise by a client to pay money to a Counsel for his advocacy whether made before or during or after litigation has no binding effect; and furthermore, that the relation of Counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." This conclusion was declared by the Court to be in consonance with the authorities and with principle founded on good reason. I need not quarrel with this conclusion, which was prompted rather by a regard for the best interests of the public and of the profession than for adherence to precedents. From the authorities already cited it will be clear that I do not agree with the decision as a matter of law, however beneficial it may be to the administration of justice. I am content to accept the declaration of Lord Watson in *Reg.* v. *Doutre*,[2] viz.: "Their Lordships are willing to assume that the law of England, so far as it concerns the right of the Bar in England to sue or make

[1] 13 C. B. (N. S.) 677; 9 L. T. 736.

[2] 9 App. Cas. 745 (1884).

agreements for payment of their fees, was rightly applied in the case of *Kennedy* v. *Brown*, but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J."

The important point for my present purpose, however, is not whether this decision is right, but the statement by Erle, C.J., in reference to Counsel's fee that "in England the general usage is pre-payment."

It is true that with the extended use of cheques the old practice of paying the fee with the brief was continued. Under the tape the cheque for the fee was to be found. Such was the universal practice, but to-day this is far from being the case. Apart from the case of Counsel in leading practice—and even here only, perhaps, in case of those in the first rank—is the cheque paid with the brief except in criminal causes. Here and there an old-fashioned solicitor continues the practice in the case of all Counsel, but it is sufficiently rare to cause surprise and comment in chambers. And it is still customary for a solicitor, when delivering a brief to a Counsel for the first time, to accompany it with the fee. With those exceptions, the general practice is to deliver the brief without the cheque.

The judges have never been tired of declaring that Counsel have the remedy in their own hands. They are not obliged to accept a brief without the fee. This was a sound doctrine in the earlier days of a comparatively small Bar, when the duty of Counsel not to accept a brief without the fee was the rule and not the exception, and when breach of this rule was regarded as a breach of the etiquette of the Bar. But with the enormously increased membership of the Bar, and consequently increased competition, the rule is habitually, nay almost entirely disregarded. Only the other day the Prime Minister, in a public speech, related how he received his first brief without the fee and without the slightest expectation of ever seeing

it. *Yet in spite of this general disregard* and practice, the General Council of the Bar have passed the following resolution, viz.:—"It is a breach of professional etiquette for Counsel to whom a brief has been delivered by a solicitor to agree with that solicitor that he Counsel will wait for payment of fees payable on the brief until that solicitor shall have received them from his lay client."

Apart from those cases in which Counsel or his clerk is told by the solicitor, as an excuse for non-payment of the fee with the brief, that he has not yet received it from his client, or in which Counsel or his clerk has expressly agreed to wait, there are the innumerable cases where the brief is left without the fee and nothing is said. In such cases surely Counsel by his conduct impliedly agrees to wait for his fee. The rule, if it means anything at all, means that Counsel ought not to accept a brief without the fee. What is the object of passing rules which it is well known are habitually and generally disregarded by the profession? If the gratuitous theory is correct, what need of any rule? But it has become a mere legal fiction. The first request by a solicitor to his client is for a cheque to cover out-of-pockets and Counsel's fees. The public is under no delusion as to the gratuitous services of Counsel. It is recognised as matter of common knowledge that the services of Counsel must be paid for, and paid for in proportion to the importance and intricacy of the cause and the professional status of the advocate. It is the modern system of credit which is causing the trouble in both branches of the profession. But it is quite impossible for individual members of the Bar to oppose the system.

The junior Counsel who declined to accept a brief without the fee would lose his practice within a month. This system of credit is demoralising to the Bar, a constant source of temptation to solicitors, and unfair to the public. The rule that Counsel cannot be sued for negligence is a

natural corollary to his incapacity to contract for his fees. On the ground of expediency alone both rules must be retained. But since the practice which prevailed of prepayment when those rules were introduced, has given way to the credit system, it is necessary to bring the new rules relating to payment into conformity with modern ideas.

It should be a breach of professional etiquette for Counsel to accept a brief without the fee except for good cause, and Counsel who accepted a fee in a cause to which he was unable to attend should be liable to return such part of the fee as might be apportioned to attendance in Court. And since the General Council of the Bar has no disciplinary powers, these and similar rules relating to the etiquette of the Bar should be stringently enforced by the Benchers of that Inn of Court of which the offending Counsel may be a member.

It is matter for regret that the attempt should have been made by the authors of the new Regulations to weaken the principle laid down in *Sadd* v. *Griffin*, and to lend official support to that credit system which is one of the causes of the disrepute in financial matters in which the profession of the law as a whole is held in the public estimation.

HUGH H. L. BELLOT.

III.—THE LAW OF THE UNIVERSITIES.

IX. THE UNIVERSITY COURTS.

THE literature on this subject is of vast proportions. All that can be done in this place is to afford a guide to some of the main points, illustrated by cases. Only a selection of the numerous cases can be given, especially as many of the older ones are either no longer

good law or deal with circumstances which have passed away or on points of obsolete pleading.[1]

The courts are the Chancellor's or Vice-Chancellor's, those of the High Steward and of the Coroner, and the Leet.[2] The first is the most important in history and in practice.[3] It seems to have existed as long or almost as long as the Chancellor himself and has been for many centuries a necessary adjunct to the position. But the procedure and jurisdiction of the courts of the two universities have never been the same, and even now they differ in several important particulars, especially that the Cambridge court can only try cases where both parties are members of the university. The theory of a court for privileged persons is not peculiar to England, the *privilegium fori* was found at Paris and Bologna, but has not been adopted in the newer English universities. In one of the Bentley cases the existence of the Cambridge court was pleaded as being of immemorial antiquity. Cases occur as early as the *Year Books* in which the Chancellor's jurisdiction was considered by the superior courts and sometimes admitted and sometimes not. The procedure before recent changes was by the Civil and not by the Common law, *i. e.*, inquisitorial and not accusatorial.[4] By the Act of 1854 the Common

[1] *E. g.*, that a defendant cannot claim privilege by demurrer, *Davies* v. *Stringer*, [1696], Carth., 354. Demurrers no longer exist.

[2] The old Court of Hustings at Oxford, now obsolete, was a city and not a university court.

[3] Its real name may be considered doubtful, as both are used. For instance, the official title of the MS. series of decisions is *Acta Curiae Cancellarii;* in the Oxford statutes it is *Curia Commissarii sive Vice-Cancellarii.* On the other hand the assessor is called in a university statute of 1897 assessor in the Chancellor's court. Possibly the name of Vice-Chancellor's court became common when the Chancellors ceased to be resident graduates. In the fifteenth century deputies called *hebdomadarii*, no doubt because they sat weekly, frequently acted. Unlike the Chancellor they were subject to challenge (*recusatio*).

[4] *Dijudicant per jus civile et secundum juris civilis formam*, Sir Arthur Duck, *De Usu et Authoritate Juris Civilis*, ii, 8, 3, 30 [1654].

law procedure was substituted at Oxford. The Act of 1856 has no corresponding provision as to Cambridge, but it may be taken that since the Act of 1894 the Common law procedure is the one adopted at Cambridge. The cases noted in Anstey and other sources, such as Brian Twyne and Ayliffe, show how multifarious were the matters coming before the Chancellor or his deputy in his judicial capacity. Administration of oaths to the sheriff to assist the Chancellor, to keep the peace,[1] that the principal of White Hall is not a Scotsman. Licences to beg and to preach. Proof of Wills. Compurgation. Shooting at the proctors. Wearing swords. Abjuration of playing tennis. Sanctuary in Broadgates Hall. Embezzlement of contributions towards a college cook's annual "beanfast." Excommunication[2] and pillory. Oath of sojourner that he was well disposed to the king. Appointment of Clerks of the Market.[3]

William of Drogheda the canonist, in his *Summa*, shows how he made three actions out of one *injuria* in the court.[4] In 1716 Ayliffe was prosecuted in the court for some expressions in the appendix to his *Ancient and Present State of the University*, one of the main authorities on the court. He had accused the Warden of New College of misappropriating the revenues of the college.[5] In 1693 proceedings

[1] *Oweyn, Clericus, Vicarius Sti. Aegidii, juravit super librum de pace servanda, induxit baculum,* (gave up the stick), *et solvit duos solidos*, (Anstey, 668). The Chancellor, besides having to determine a question of fighting, might have to fight himself. In the fourteenth century there was a pitched battle at the Smithgate between him and Roger of the Dead Sea (B. Twyne, *Apologia*, 295 [1608]). It may be noticed that Twyne's MSS. are difficult of access, as they appear to be in three different places.

[2] The power of excommunication no doubt depended on the original position of the Chancellors as delegates of the bishops of Lincoln and Ely.

[3] These still exist, but the office is now a sinecure. At Cambridge they never existed, but similar powers were granted against forestallers and regrators by patent rolls of Edward II and Richard II. See *Documents relating to the University and College of Cambridge*, pp. 5 and 26.

[4] F. W. Maitland, *Eng. Hist. Rev.*, xii, 652.

[5] See *The Case of Dr. Ayliffe at Oxford* [1716], supposed to have been written by Ayliffe himself

were taken against Anthony Wood for a libel on the Earl of Clarendon's father.[1] The Cambridge court in 1718 deprived Bentley of his degrees. Two modern Oxford cases of interest will be found in the Appendix. The rights of the courts were continually limited by prohibition and by imperial legislation. It was early settled that they could not entertain questions affecting the freehold,[2] or *quo warranto*, or *quare impedit*. As to equity the matter was more doubtful. In 1675 the claim of the Oxford Chancellor to hold a court of equity was disallowed.[3] In 1714 a similar claim was allowed.[4] Perhaps the best solution is to be found in a case of intermediate date, where the Court of Chancery held that the jurisdiction of the Oxford court extended to matters in Common law or to proceedings in equity that might arise in such cases, not to pure matters of equity, such as specific performance.[5] It is submitted that this probably represents the modern law and that the Chancellor's court is in much the same position as the King's Bench Division when a question of equity comes before it. It has been held that the superior court cannot take judicial notice of the privilege of the Chancellor's court. Being a franchise it must be pleaded. In this particular case the university was put to declare in prohibition.[6] Whether the jurisdiction of the court can be waived by a litigant entitled to take advantage of it is somewhat doubtful. In an action for defamation it was not allowed.[7] In a later case the defendant, a non-privileged person, waived objection to the jurisdiction, then

[1] Described in Vol. iv of *Wood's Life and Times*.

[2] This was held as to land in Cornwall claimed against the Rector of Exeter, *Stephens* v. *Berry* [1683], 1 Vern. 212. The case is interesting as being one of the numerous proceedings against Dr. Bury or Berry.

[3] *Prat* v. *Taylor*, Cas. in Ch., 237.

[4] *Alderidge* v. *Stratford*, 22 Vin. Abr., 11.

[5] *Draper* v. *Crowther* [1685], 2 Vent., 362.

[6] *Cambridge University* v. *Price* [1697], Skin., 665.

[7] *Wilcocks* v. *Braddell* [1628], Cro. Car., 73.

afterwards appeared and defended on the merits. He was arrested by warrant of the Duke of Wellington and ordered into custody till he had satisfied the debt. It was held by the King's Bench that he might still be discharged on *habeas corpus* and might insist before the superior court on the want of jurisdiction.[1]

The Oxford court is regulated by a statute of the university of 1636, amended by later statutes, and by statutes of the realm and rules framed thereunder, all in more or less accordance with previous charters. The jurisdiction extends over every *scholaris vel persona*[2] *privilegiata in universitate degens*, and that when only *una pars scholaris*, provided that the matter is a civil one. Criminal proceedings have been dealt with in the chapter on discipline. The imperial statutes regulating the Chancellor's court are those of 1862 and 1884, the university statute is Tit. xxi (*De Judiciis*). By the Oxford University Act, 1862 (25 & 26 Vict., c. 26, s. 12), the Vice-Chancellor was empowered, with the approval of any three judges of the superior courts, to make rules for regulating the practice and forms of procedure in all proceedings within the jurisdiction of the court of the Chancellor of the university commonly called the Vice-Chancellor's court, and with the like approval to annul, alter, or add to any such rules. The Supreme Court of Judicature Act 1884 (47 & 48 Vict., c. 61, s. 24), enacts that where by virtue of any statute or charter or otherwise powers of making rules and orders for regulating the procedure or practice of or the costs or fees of any inferior court of civil jurisdiction[3] are given to

[1] *Perrin* v. *West* [1835], 3 A. & E., 405.

[2] *Persona* includes a college, *Magdalen College Case* [1674], 1 Mod., 163.

[3] The Chancellor's court is a court of record, but is at the same time an inferior court to which prohibition or certiorari will lie. In this it resembles the County Courts. The Common Pleas in *Kemp* v. *Neville*, admitted that the Cambridge court is a court of record, but the case was decided on the facts, and no certiorari was applied for. It was granted in *R.* v. *Vice-Chancellor of Cambridge.*

or have been exercised by the judge of any such court . . . . . any rules or orders made after the commencement of the Act by virtue of any such powers as aforesaid shall be subject to the concurrence of the authority for the time being empowered to make rules for the Supreme Court. Further provision is made for the alteration or annulment of any existing rule or order. Under the powers of this Act rules of procedure were made on 21st March, 1892, by the Vice-Chancellor with the approval of the Rule Committee of the Supreme Court. These rules were amended on 20th October, 1907. They will be found in the *Gazette* of the respective years. They repealed the rules of 1864 made under the Act of 1862.

The ordinary judge is an assessor, appointed by the Vice-Chancellor under a university statute of 1897.[1] Under the same statute a registrar of the court is appointed by the Chancellor by letters patent, and "a competent number of solicitors" may be admitted as proctors by the Vice-Chancellor.

Appeals formerly lay in spiritual cases ultimately to the Pope,[2] then to the Arches Court of Canterbury, in secular cases to the Delegates of Appeals in Congregation and from them to the Delegates of Appeals in Convocation, with a final appeal to the King in Chancery. All this has been changed by an Order in Council of 23rd August, 1894, which enacts that in pursuance of the Supreme Court of Judicature Act 1875 and the Statute Law Revision and Civil Procedure Act 1883, the enactments and the rules of the Supreme Court relating to appeals from county courts shall apply to the Chancellor's court, commonly called the Vice-Chancellor's court, in the University of Oxford.

[1] This seems inconsistent with the 1636 statute (xvii, 2), under which the Chancellor is to hear and determine *controversias omnes circa causas civiles spirituales et criminales* affecting privileged persons. Nothing is said about a deputy, and the spiritual and criminal jurisdiction is without a doubt obsolete.

[2] Anstey, 460.

The court of the High Steward has been already mentioned. He has still nominally the right of holding a leet or view of frankpledge[1] (Statute xvii, 2), which he shares with the Chancellor (xvii, 1, 2). The Chancellor's court was a court of probate for resident members up to 1860. The probate jurisdiction was abolished by 23 & 24 Vict., c. 91. A coroner appointed by Convocation holds an inquest on the death of any resident member of the university where an inquest is necessary. This right is specially preserved by the proviso saving the rights of franchise coroners under the Coroners Act 1887, s. 42. The jury should consist wholly or chiefly of matriculated persons.

The Cambridge court, also a court of record, differs in many particulars from that of Oxford, and the effect of its narrower jurisdiction is that the reported cases concerning it are fewer in number. The ordinary judge is the commissary. Its jurisdiction in civil matters is now confined to cases where both parties are privileged persons, not where there is only *una pars scholaris*, as at Oxford. But this was not always the case. For instance, the charter of 1588 gave jurisdiction *omnium placitorum personalium ubi persona sub privilegis universitatis una pars erit.*[2] And by Close Roll of Edw. III, fol. 30, indictments of stationers, writers, binders, and illuminators of books were to come before the Chancellor's Court.[3] No advocates for the parties were allowed under penalty of the party using one losing his case, unless for bad health or other legitimate cause.[4] Consequently there are no proctors of the court, as at Oxford. This view of the court as a *forum domesticum* is still carried

[1] Referred to as existing in the *Magdalen College Case* [1647], 1 Mod. 163. The clerks of the market are perhaps the last vestige of the leet jurisdiction. At Cambridge the leet seem to have existed a century later, as it is treated as existing in the litigation arising out of the contest for the High Stewardship in 1765. Much information as to the leet will be found in E. J. C. Hearnshaw, *Leet Jurisdiction in England* (1908). [2] 1 Dyer, 33.

[3] *Documents relating to the University Colleges of Cambridge*, 21.

[4] *Statuta Antiqua*, 325.

out by Stat. A, c. 8, of the existing university statutes in these words: "All causes and contentions which belong to the cognisance of the university shall be submitted to the judgment of the Chancellor or the commissary unless one of the litigants be a person having the degree of M.A., or some equal or higher degree, in which case the Chancellor shall have jurisdiction. They shall be determined with as little delay as possible and without the formalities of law." The only jurisdiction over non-members of the university appears to be over women of bad character.[1]

An appeal from a decision of the commissary lies to the Chancellor within six hours, from the Chancellor to the Senate within two days. There is no further appeal to the High Court of Justice as there is from the Oxford court.

The jurisdiction of the Chancellor's court is protected by the doctrine of conusance of pleas.[2] The court being a franchise, its jurisdiction will be recognised by the High Court on the claim being duly proved by evidence. On due proof, the case, if brought in any other court, will be remitted to the university court. Conusance is still competent, having been acknowledged by the King's Bench Division as lately as 1886.[3] At Cambridge the right is limited by 19 & 20 Vict., c. xvii, s. 18, which abolishes the right of the university to claim conusance of any action or criminal proceeding where any person who is not a member of the university is a party. The earliest recorded claim seems to have been made in 1367. At one time the claim was allowed in cases where it would not now be admitted.

[1] See the chapter on discipline. The jurisdiction *inter extraneos* given by the statutes of 1570 *in nundinis Sturbrigiensibus et iis quae ad festum Sancti Johannis Baptistae apud Barnwell tenentur* seems obsolete.

[2] It is also called cognisance or *cognitio*, in criminal matters *significatio* or *notificatio*. Cognisance in this sense must be distinguished from cognisance in replevin. They have nothing but the name in common.

[3] *Ginnett* v. *Whittingham*, 16 Q. B. D., 761.

It lay at Oxford in the case of members of matriculated[1] guilds of tradesmen, of college servants, and of non-resident members of the university. Conusance may be claimed in four different ways: (1) by the King, (2) by the Chancellor, (3) by the Vice-Chancellor, (4) by the defendant. The King appears to claim by virtue of his invaded franchise.[2] But as a matter of practice the second and third modes are the only ones now in use.[3] It cannot be claimed in every case—for instance, where the Chancellor or Vice-Chancellor is sued, for that would make him judge in his own cause.[4] It did not lie against the Exchequer when that was a separate Court,[5] and possibly does not lie now where the question to be tried is a purely equitable one. To support the conusance a charter must be proved, it will not be presumed.[6] The privileged person must show that he was privileged at the time of action brought, it is not enough to show that he was such at the time of claim of conusance.[7] The Chancellor claims conusance at his peril. "If the Chancellor should certify falsely that a person is resident who is not, there is no doubt that an action upon the case would lie against him."[8] A good illustration of the working of the claim is afforded by a seventeenth century case. Plaintiff filed a bill

[1] The Chancellor of Oxford still has nominally authority to constitute *incorporationes artificum intra universitatis praecinctum* by the statutes of the university, xvii, 1, 2, 11. *Matricula* seems to be derived from *matrix*, and means a register. It is so used in the Theodosian Code. Its use in this sense is not unlike its use in Scotland, where it means the insertion of armorial bearings in the Register of the Lyon King of Arms, regulated by an Act of the Scottish Parliament of 1672.

[2] Such claim appears in one or two old cases, as in *Anon.* [1630], Litt., 304, where it was granted on the non intromittant clause in the charter of 14 Hen. VIII.

[3] The form of claim by the Chancellor, the Marquess of Salisbury, will be found in *Ginnett* v. *Whittingham*, above, and a much more voluminous one in the older style by the Earl of Arran in *Welles* v. *Trahearne* [1740], Willes, 241.

[4] Unless in trespass, *Chase's Case*, above.

[5] *Wilkins* v. *Shalcroft* [1662], Hardr., 188, the reason being that only the Justices of either Bench were named in the charters of exemption.

[6] *Y. B.*, 40 Edw. III, 18, 8; *Y. B.*, 18 Hen. VI, 18, 6.

[7] *Fryer* v. *Dew* [1628], Godb., 404.

[8] Lord Camden in *Hayes* v. *Long* [1766], 2 Wils., 310.

to have a bond for £100 delivered up, the sum secured having been paid. Answer that the defendant was a Doctor of Law resident in Oxford. The Chancellor certified and demanded conusance. The court dismissed the bill.[1] It has been already stated that a college may make the claim.[2] Conusance or *significatio* need not necessarily be claimed; it is entirely at the discretion of the Vice-Chancellor or other person entitled to claim. There is a tendency at present to leave small cases to be tried by justices of the peace in the ordinary course.

Some of the authorities state that *Castle* v. *Lichfield* [1670] Hardr., 505, is the oldest reported case in which conusance was allowed. But the dates of other cases show that this must be erroneous. It was an *indebitatus assumpsit* for tobacco supplied and the claim was admitted.

JAMES WILLIAMS.

IV.—CRIMINAL STATISTICS, 1907.[3]

THE common-places of an idealistic system of philosophy strike the ordinary person as fantastic and absurd. The analysis of the sensations of taste or touch creates in him an uncomfortable feeling and robs him of his easy-going unthinking belief that the material world somehow exists quite independently *of* him, in just the same way as it exists *for* him. He becomes impatient with this foolery and approves heartily of Dr. Johnson's short way of refuting Bishop Berkeley. The idea that knowledge is something to which "the subject" is as necessary as "the object," seems to him preposterous; he much prefers to banish such

[1] *Bushby* v. *Cross* [1676], 22 Vin. Abr., 3.

[2] *Magdalen College Case*, above.

[3] *Judicial Statistics (England and Wales)*, 1907. Part I.—Criminal Statistics. London: Wyman & Sons.

unprofitable speculations and to remain contentedly satisfied with the belief that sugar is in itself sweet, and that the relation of cause and effect is somehow inherent in the nature of things. He is in short incurious about the psychology of knowledge, and would be astonished to learn that his constant habit of compiling statistics with the object of drawing inferences from them is really a manipulation by himself of material which would otherwise remain formless and chaotic. There is a natural tendency in every man—even in the philosopher in his unphilosophic hours—to think that somehow the categories of the human mind correspond to real differences in things, and it is difficult to escape from the sub-conscious belief that the division of history by the reigns of kings and emperors, or by centuries, has some special significance, apart from the fact that such divisions are merely a convenient device for obtaining a general survey of things. Our habit of taking stock, so to speak, at the end of say 50 or 100 years, is merely one result of our decimal system of numbering. This reflection may serve to lessen the feeling that the volume of criminal statistics for 1907 is of less interest than the volume issued in 1908. Last year's volume was the fiftieth of the series which gives statistics of crime, and it contained in addition to the figures for 1906, comparative tables which showed the variations in the statistics over a period of 50 years. The present volume contains the statistics for 1907, and its comparative tables are restricted to the years 1903—1907. There is no reason in the nature of things why the 50th rather than the 51st year should be the "natural" year in which to review the variations of recorded crime, nor is there any reason why 1856 should be the starting point of the series of volumes. The interest, however, of the study of statistics lies in the examination of the figures, as compared with corresponding figures for other periods, and in the attempt to explain the variations

which appear: and the greater the area over which the comparison can be made, the greater is the interest of the study. It therefore remains true that the present volume with its restricted comparative tables is of less interest than the preceding volume.

Last year we expressed the view that the great majority of the serious crimes committed may be traced to the unsatisfactory conditions in which the poorest classes live, and we maintained that the astonishing diminution in crime during the last half-century could only be explained by the general rise of the standard of life among the less fortunate strata of society. The diminution is so remarkable that it is worth while again to recall the figures—in 1857–61 the average number of persons tried for indictable offences was 52,346, and in 1906 the number was 59,079: yet in the meantime the population had nearly doubled itself. It would be unreasonable to expect that each year should show a distinct advance over the preceding year—the infinity of forces which affect the general condition of a people, leads us to be prepared for occasional set-backs. And, in fact, this was the case: though the general results of the period of 50 years were entirely satisfactory, there were from time to time slight relapses. It is obvious, for example, that a year of trade depression, or of bad harvests, tends to drive below the margin of subsistence many who would otherwise have lived comfortably enough: and it is not unnatural that in such a year there should be an increase in the number of larcenies. It is therefore no cause for despair if the statistics for any given year seem to compare unfavourably with those of the preceding year. The wise reformer is too aware of the complexity of human affairs to be disheartened because the tide of progress occasionally seems to ebb.

It is with this view of progress that we must approach the statistics for 1907. It may be remembered that for the purpose of these statistics offences are divided into three

classes[1]—indictable offences, *criminal* non-indictable offences, and other non-indictable offences. The first of these classes needs no explanation. The second class includes such offences as assaults, cruelty to children, malicious damage, offences under the Prevention of Crimes Acts, and certain offences, such as frequenting, under the Vagrancy Acts—the word "criminal" being used, not in a technical sense, but in order to distinguish the more serious of the non-indictable offences from those which cannot be regarded as "criminal" in the ordinary sense of the word. This last class of offences—described as "other non-indictable offences"—roughly comprises all contraventions of municipal regulations established in the interests of the public safety, health or comfort, and not involving violence, cruelty, or gross dishonesty. It is generally admitted that the figures relating to the first of these three classes are the best index to the fluctuations of crime, and the figures for 1907 show that there has been an increase of crime. It is perhaps as well here to enter the customary caution as to the reliability of inferences drawn from statistics. It is obvious that statistics must always be considered in relation to the material with which they deal, and that they become less reliable as the material becomes more complex. But we cannot have it both ways: we cannot on the one hand appeal triumphantly to statistics when their results are in accordance with our wishes, and on the other hand seek to discredit them as mere figures when their results are disappointing. If we are justified in claiming a general improvement during the last half-century on their authority, we must equally admit that in 1907 there was a set-back. For the figures relating to indictable offences show that 98,822 indictable offences were reported to the police in 1907, as against 91,665 in 1906: the proportion of such offences to the population, per

[1] The number of persons in 1907 for trial, or tried, for (A) indictable offences was 61,381; (B) *criminal* non-indictable offences, 79,862; and (C) other non-indictable offences, 605,712; total of the three classes, 746,995.

100,000 being 283 in 1907, as against 275 in 1906. It is true, as is pointed out in the Introduction to the volume, that "as compared with the previous year, the total number of persons tried, of persons convicted, and of convicted persons imprisoned, have all appreciably decreased," but this decrease is restricted to minor offences. On the assumption that the figures relating to indictable offences are the best index to the volume of crime, crime increased during 1907.

We may now consider these figures more in detail, using the numbers of persons actually tried for indictable offences, at Courts of Record and at Courts of Summary Jurisdiction. The total number of persons so tried in 1907 was 61,381, as compared with 59,079 for 1906, and with 60,065 as the annual average for 1903–7. This increase of 2,302 over the figures for 1906 is mainly due to an increase in the number of persons tried for offences against property, which in 1907 was 57,809, as compared with 55,483 in 1906. It is pointed out in the Introduction that offences against property, mainly consisting of different forms of dishonesty, make up about sixteen-seventeenths of the total of crime and completely dominate its annual fluctuations. It is a curious fact that the number of offences against the person usually varies inversely with the number of offences against property. During the last twelve years the number of prisoners tried for offences against the person has varied only within narrow limits: it was 2,812 in 1896 and 2,596 in 1907. The number of persons tried for offences against property during the same period has varied roughly between 47,000 and 58,100, the number in 1896 being 47,400 and in 1907, 57,809. The movements of the figures are, perhaps, hardly large enough to justify any attempt to discover a necessary relation between them, but there seems to be some ground for thinking that if there be a variation, it will tend to be inverse. Offences against the person are very often the result of a momentary outbreak of passion, whereas

offences against property as a rule are the outcome of some general defect in character. It is, perhaps, worth while in this connection to point out that most of the persons convicted of murder or manslaughter have no previous criminal history, while the professional thief has a long record behind him. Now, if we neglect for a moment the number of offences committed by the habitually dishonest man—a number which is probably fairly constant, save when misguided leniency lets loose an irreclaimable criminal either immediately on conviction or after a very short term of imprisonment—it is reasonable to suppose that the "marginal" offences against property are committed by persons who just fall below the level of a decent self-maintaining existence. A general increase of prosperity will prevent a number of persons, who in a time of distress would have preyed on their neighbours, from committing offences against property, and the total of such offences in a year of prosperity will decrease. But is there any reason to think that a time of prosperity tends to increase a general control over the passions? It seems perfectly natural to expect the reverse—a horse "full-fed at the manger" has more devil in him than a horse which barely gets enough to eat. So much for the material effect of a time of general well-being. Again, if we consider the effect which a raising of the moral standard might be expected to have on crimes against property and crimes against the person, we should rather expect to find a more direct effect on the former than on the latter. Education has a more immediate result in enabling a man to adopt and adhere to the "rational" view of property on which organised society depends, than in enabling him to control what all writers agree to call the "irrational" elements in his nature. The relation of the numbers of crimes against property and of crimes against the person therefore seems to depend on two main factors. On the one hand, there is the general

raising of the moral standard which, it is suggested, tends to reduce the number of crimes against property more rapidly than the number of crimes against the person. On the other hand, it is suggested that in any particular period the prevailing economic conditions affect the numbers of these two classes of crime in exactly opposite ways. If it is conceded, as seems reasonable, that changes in the economic conditions of any period have a more immediate effect on crime than does the necessarily slow rise of the moral standard, the conclusion seems just that the relation between crimes against property and crimes against the person tends to be one of inverse variation.

The number of persons tried for offences against the person in 1907 was 2,596, as against 2,704 in 1906, one of the principal decreases being that in the number of homicides and manslaughters. These fell from 205 to 166—the lowest recorded figure. Turning to offences against property, we find that the number of prosecutions for burglary and housebreaking in 1907 was slightly less than in 1906—the figures being 3,132 for 1907, as compared with 3,174 for 1906. There were, however, more such crimes reported to the police than in 1906—the number being 11,470, an increase of 873 over the preceding year. This increase occurred mainly in the Metropolitan Police District, and in the Report issued by the Commissioner of Police of the Metropolis for the year 1907 it is stated that burglaries and housebreakings increased in his district by 605. This increase accounts for nearly three-quarters of the total increase for the whole country, and the Report proceeds to say that "it may be a coincidence, but it is certainly noticeable that the marked increase in burglaries and housebreakings was synchronous with the period during which a relatively large number of short sentences and orders 'binding over' prisoners were passed." These offences are the special province of the professional

criminal, and it seems clear that a "professional" has a longer run before he is caught, than does any other type of criminal. Thus, the proportion between the total number of housebreakings and burglaries committed, to the number of prosecutions for these offences in 1907 was roughly 11 : 3; while the proportion between the total number of indictable offences known to the police and the total number of prosecutions for them was roughly 5 : 3. It is therefore reasonable to suppose that if a lenient policy is adopted towards professional criminals, it will have the effect of increasing the number of crimes committed by the "professionals" themselves and those whom they instruct in the way of crime. At any rate, the figures show that indictable offences, including burglaries and housebreakings, in the metropolis, increased at a rate which was more than double that of the rest of the country: for the Metropolitan Police District, the increase, as compared with 1906, was from 19,819 to 22,401, an increase of 13 per cent., while for the remainder of England and Wales the increase was from 71,846 to 76,421, an increase of 6 per cent.

It is to be hoped that the effect of the Prevention of Crimes Act, which comes into force on the 1st of this month, will be to reduce the number of professionals. The Act supplies a double remedy against habitual crime: it provides a means for dealing with the existing class of "habituals," and also a means for checking its growth. To restrict the activities of existing habituals, the Act gives power to the Court to declare an offender to be a habitual criminal, and such an offender may be sentenced to a term of preventive detention not exceeding ten years, in addition to any punishment imposed for the particular offence of which he stands convicted. The effect of this should be to remove experts in crime for a more or less lengthy period from society. It is unfortunate that public sentiment, or rather sentimentality, in so far as it is, if at all, expressed by the House of Commons on this

question, should have rejected the original proposal in the Bill to enable a Court to order permanent detention in suitable cases. To prevent the growth of the class of habituals, the Act provides for the application of the training and discipline now given at Borstal prison to youthful offenders. The object of the Borstal system is to subject young criminals who are on the road to become habituals to a long period of detention, during which their morale and physique are improved and a trade is taught to them. The futility of short terms of imprisonment is recognised on all hands: there is very little good in detaining a young hooligan for periods of one, two, or three months and then turning him loose without any means of maintaining himself in an honest livelihood. The Borstal system tackles the problem very differently: the youth is subjected for a period of from 12 to 24 months to a strict discipline and is instructed in a trade, and on his release the Borstal Association keeps in touch with him and endeavours to prevent him from "going under" again. The Act requires the Prison Commissioners to create Borstal Institutions in which this discipline and instruction may be carried on, and a useful provision places the offender under supervision for a period of six months from the expiration of his sentence. If he makes no effort to live honestly, he can be sent back for a further period of detention. It will of course be necessary to wait for a few years before any attempt can be made to judge of the results of the Act, but there can be no doubt that it marks a distinct advance in penal legislation.

We now come to the figure for larcenies, which include the offences committed by habituals such as confirmed pickpockets, and the single lapses by persons who succumb to temptation, perhaps, once only in their lives. The number for 1907 shows an increase over that for 1906—the figures for the two years being 50,140 and 47,586 respectively. There is no special remark to be made about

this increase, but it is perhaps worth while to call attention to the fact noticed in the Introduction, that changes in business methods give rise to new offences: 24 of the children admitted to Reformatory Schools were convicted of stealing from "penny-in-the-slot" gas meters. In a recent report of such a case, it was stated by the representative of a Gas Company that the number of similar offences committed against his Company which were never brought home, ran into thousands, and the magistrate took occasion to remark on this fact as illustrating the fallaciousness of statistics. But it is unreasonable to suppose that the statistics of any given year are specially affected by the disinclination of people to report or prosecute for offences. We must always allow for the fact that there is such a disinclination, and there is no ground whatever for believing that the disinclination is epidemic and not chronic. If the disinclination is a "constant" fact, it cannot affect the value of statistics for purposes of comparison. To revert to figures, the number of convictions of arson, forgery, coining and uttering, shows a slight decrease; but the total number, 476, is small and calls for no special comment. The number of convictions of perjury, 45, is of course absurd when we reflect on the amount of false evidence given to the Courts. Perjurers are very rarely prosecuted; possibly one reason is that it is nobody's business in particular to prosecute offenders. One might almost say that perjury has come to be regarded as an accepted weapon of defence, and that it is seriously reprehended only when it is used as a weapon of offence. The prevalence of the offence is, however, a matter of grave concern, and any discussion of it would seem to raise the old problem of the duty of a solicitor or barrister who is satisfied that his client is lying. We may conclude our remarks on indictable offences by pointing out that the number of persons committed under the Inebriates Acts shows a large increase—477 in 1907,

as against 377 in 1906. The bulk of these persons were women, and practically all were committed either as habitual drunkards, or for having neglected their children through drink. The working of the Inebriates Acts has recently been the subject of inquiry by a Departmental Committee, and amending legislation was promised in the King's Speech at the opening of the present Session of Parliament. Experience has shown that the Courts do not as a rule commit persons to Inebriate Reformatories till the prospect of reformation is almost hopeless, and the main service performed by the Reformatories has been to keep drunkards out of the way for a lengthy period. The percentage of weak-minded persons amongst the inebriates detained in Reformatories is very high—more than half are estimated to be defective, though they cannot be certified insane under the existing law. This proportion is higher among the women than among the men: and it seems to be a question whether the majority of inebriates now under detention should not be dealt with rather as mentally defective than as inebriates. It may be remembered that this is the view expressed in the recent Report of the Royal Commission on the Care and Control of the Feeble-minded. As things are at present, however, it is infinitely better that the victims of inebriety shall be detained for long periods, than that they should be left continually to wander in and out of prison for a few days at a time. The cases of cure may be rare, but at any rate both the inebriates and the public at large are spared much distress and annoyance by the system of prolonged detention.

We now come to the figures for non-indictable offences, and we find that they show a decrease as compared with the figures of 1906. 78,862 persons were tried for *criminal*[1]

[1] If we regard the volume, not only of indictable offences, but also of *criminal* non-indictable offences, as giving some indication of the total amount of serious crime in the country—and many of these offences, such as frequenting, or certain

non-indictable offences in 1907, as against 82,264 in 1906; and the corresponding figures for non-criminal non-indictable offences are 605,712 and 618,714. There is thus a total decrease of 15,404. This decrease, however, is entirely due to the decrease in the number of prosecutions in the Metropolitan Police District by some 17,000; in the remainder of England and Wales there was an increase of prosecutions by some 2,000. It was pointed out last year that the figures for the Metropolitan Police District were seriously affected by the appointment of the Royal Commission as a result of the D'Angely case. The shrinkage of prosecutions occurred principally with regard to offences of public disorder, and it will be remembered that about that time the sensational press expended much energy in calling attention to cases where the police brought such a charge and the offender was not convicted. Now that confidence in the integrity of the force has been restored by the Report of the Commission, it may be expected that the number of prosecutions in the Metropolitan Police District will fluctuate in the same way as the numbers for the country generally. There can be little doubt that but for the appointment of the Commission, the figures for non-indictable offences would have shown an increase in the total. Lack of space prevents us from giving details of this section of the statistics, but we may perhaps quote from the Introduction that "offences against the Education Acts have steadily diminished since 1900, mainly in consequence of the passing of the Elementary Education Act 1900, which increased the maximum penalty for breach of bye-laws requiring the attendance of children at school, from 5s. to 20s. It may be observed that the falling off in prosecutions is not accompanied by a fall in the per-

breaches of the Prevention of Crimes Act, are evidence of general criminal character--the figures for 1907 are practically the same as for 1906. The total number of persons tried for these two classes of offences in 1907 was 141,243, and in 1906, 141,343.

centage of average attendances to the average number of children on the school registers, the per-centages for the eight years ending 31st July, 1907, being 82·06, 82·48, 83·56, 84·42, 85·70, 86·83, 87·92 and 88·43 respectively." It may also be of interest to note that motor-car offences have increased from 6,777 in 1906 to 8,278 in 1907—an increase which no doubt seems trifling to the indignant pedestrian. As a curiosity, it may be mentioned that there were 6,581 prosecutions for Sunday trading, nearly all of which occurred in eight police jurisdictions, Hull easily leading the way with a total of 4,539.

The statistics relating to Criminal Courts possess some points of interest. 12,599 persons were brought before Courts of Assize and Courts of Quarter Sessions, as against 12,757 in 1906, and it is observed that of persons actually tried before these Courts the per-centage of persons convicted tends slightly to increase. The per-centage in 1907 was 84·51, an increase of 1 per cent. when contrasted with the per-centage for 1906. Of the 10,379 persons convicted, 7,096, or 68·37 per cent., had previous convictions recorded against them. This proportion is higher than in any of the 14 previous years for which figures can be obtained, and the Introduction suggests that this fact may be due to the ease and certainty of the finger-print system of identification. Turning to the sentences imposed, we may notice that there is a marked increase in the number of persons released on recognizances. The number in 1906 was 918, or 8·84 per cent. of the total of persons convicted, while in 1907 the number was 1,285, giving a per-centage of 12·38. Of this increase by 367 London is responsible for 283. It will be interesting to observe in the statistics for 1908 what advantage has been taken by the Courts of the powers created by the Probation of Offenders Act 1907. Under that Act a Court is enabled to release an offender under the supervision of a probation officer, and this power, in

suitable cases, seems likely to be of great value. Before the passing of the Act, an offender who was released on his recognizances to appear for judgment when called upon, vanished from the ken of the Court almost completely, and the number of cases in which the offender was actually brought up for judgment at any later time, though he deserved it, was practically negligible. By making a probation order, the Court is now able to keep in touch with an offender who has had a chance given to him: the probation officer is required to inform the Court from time to time how the case is progressing, and to report at once if there is any breach of the recognizance. This method of dealing with offenders has a double advantage; not only is it a means whereby the Court can judge whether leniency has been justified, but it is also very frequently a means whereby an offender, after a lapse, can retrieve himself through the timely help of the probation officer, who is required to assist and befriend him. It is needless to observe that the Act requires discretion in its exercise, lest the idea should prevail that a first offender has almost a claim to be released under it, and that the law may be broken with impunity: but it certainly seems to be an attempt to extend to offenders of all ages actively curative treatment.

Before Courts of Summary Jurisdiction, 734,356 persons were tried, of whom 48,782 were charged with indictable offences and 685,574 with non-indictable offences. It thus appears that four-fifths, roughly, of persons tried for indictable offences were dealt with summarily. Of the total of 734,356, 597,023 persons were convicted, 129,057 discharged, and 3,273 sent to Industrial Schools. Lest it be imagined that the large number of persons discharged 129,057, implies that unproven charges are freely brought, it is as well to point out that in 19,566 of these cases the charge was withdrawn, in 64,096 the charge was dismissed, and in 45,195 cases, though the offence was proved, the

defendants were discharged without conviction by the Courts in their discretion, under section 16 of the Summary Jurisdiction Act 1879. Of the 597,023 persons convicted, 76,130 were sentenced to imprisonment, and 498,325 to pay a fine: of this latter number, about 92,000 served terms of imprisonment in default of payment. It is a noteworthy fact in these days when complaints are rife as to the decay of parental responsibility, that only 127 parents were adjudged by the Courts to have conduced to the commission of offences by their children, and were thereupon ordered to pay the fine, &c. It is surprising that the Justices neglected this very effective means in their possession of bringing home to a parent his responsibility for the offences which his child had committed. But it is very probable that the effect of the provisions of the Children Act 1908, which came into force on the 1st April last, will be to stimulate parents to keep an eye on children who are likely to offend against the law.

There is nothing to call for special comment in the Police Statistics, but we may, perhaps, note that of 13,100 persons committed for trial at Assizes and Quarter Sessions, bail was allowed to 2,907. This gives roughly a per-centage of 22 per cent., the highest per-centage since 1902. The per-centage is highest in rural districts and lowest in large cities. But it is pointed out in the Introduction that there are variations, not easily accounted for, between areas in which the conditions are apparently similar: thus in Suffolk the per-centage was 49, and in Devon 44, while in Lincolnshire it was only 17. On the other hand, in Newcastle-on-Tyne the per-centage was 30, and in Sheffield 23, while in Liverpool it was 7. In the Metropolitan Police district the per-centage was 25: it is, however, necessary to remember that in London Quarter Sessions are held very frequently, and that the period of detention awaiting trial can never be long. Possibly for this reason prisoners who

otherwise would find sureties, do not take the trouble to do so.

In the Penal Statistics, we may note that the total number of convicted prisoners received into prison during 1907 was 174,632, exclusive of 528 prisoners convicted by Courts martial. Attention has already been called to the fact that of this total, about 92,000 were imprisoned in default of payment of fines. About two-thirds (116,286) of the prisoners were sentenced to hard labour. As to length of sentences, it is interesting to observe that 37 per cent. of the sentences of imprisonment were for one week and under, 25 per cent. were for more than one week and not more than two, while only 0·9 per cent. were for periods longer than one year. It is again worth while to call attention to the strange disinclination of the Courts to order prisoners to be detained in the second division, which is intended for persons whose general character is good. Only 2,504 persons were placed in the second division in 1907, and there is no doubt that this number should have been very much greater. In the first division 163 persons were placed, who suffered little discomfort beyond the actual loss of liberty.

Coming to the figures relating to the exercise of the Prerogative of mercy, we find that the total number of cases in which the prerogative was exercised was 425; of this number, 102 were cases in which persons under police supervision were relieved of the obligation to report themselves to the police, and in 122 cases remission of sentence was granted on medical grounds. In 236 cases the clemency of the Crown was shown, for reasons of a personal nature, such as the youth of the offender; while in 18 cases only were persons released on grounds affecting the original conviction. It will be interesting to observe, in the statistics for 1908, what has been the effect on the statistics relating to the prerogative of the creation of the Court of Criminal Appeal.

We may conclude with a few details as to the working of the Aliens Act 1905. In 1907 the number of aliens recommended by the Courts for expulsion was 289, as against 435 in 1906. The number of convicted alien prisoners received into English and Welsh prisons was less by 734 in 1907 than in 1906, the number falling from 3,399 to 2,668. The proportion of recommendations to receptions therefore fell from 12·80 to 10·69 per cent. There seems to be no explanation of this fact, save that the Courts did not choose to exercise their power of recommending for expulsion so freely as in 1906. In 1907, 310 cases became ripe for the Secretary of State's decision with regard to expulsion, and expulsion orders were made in 306 cases. Of these, 250 cases came from the Metropolis and 52 from the rest of England and Wales. Thus in 8 cases only did the Secretary of State refrain from making an expulsion order, and it is worth while to quote from the Report by H. M. inspector under the Act, in regard to these 8 cases, that "4 prisoners proved on inquiry to be British subjects; 2 were very young and had no previous convictions; 1 was released for the purpose of appeal and absconded; and 1 died in prison."

V.—INTERNATIONAL LAW AND THE ALIENS ACT.

THE ferocious outrages perpetrated at Tottenham in the month of January, the recent annual Parliamentary Paper on the working of the Aliens Act, and the questions and discussions arising therefrom in the House of Commons, invest with great interest the question whether any power exists in the executive by which an alien anarchist can be expelled the country. There is only one answer as far as the Aliens Act is concerned. Unlike all the previous Aliens Acts, 1793 to 1848, the present Act confers

no power on the executive to expel an alien after he has entered the country, if he does not commit any offence rendering him liable to be deported.

There can be no doubt, however, that there is a power at the Common law, frequently exercised in Queen Elizabeth's reign, and alluded to by Sir Leoline Jenkins a century later, called the *Droit de Renvoi*, by which an alien who rendered himself dangerous to the State could be expelled.[1]

The case for the existence and exercise of a right of expulsion by International law, either from the point of view of theory or modern and authoritative usage, stands on a very high footing, and International law is part of the law of England.[2]

From the point of view of modern authoritative international usage, it would be breaking a butterfly on a wheel to demonstrate the proposition that, with the possible exceptions of Great Britain and Russia, the modern State claims a right of expelling an alien who becomes dangerous to its public tranquillity. It appears from a Parliamentary Paper published more than twenty years ago, that Mr Clunet, the learned editor of *Le Journal du Droit International Privé*, rendered an affirmative opinion on this subject at the request of the Government of Lord Salisbury.[3] While some States, as France, rely on a statutory power of expulsion, Germany appears to rely solely on the right as declared by International law. In 1887 Mr. Scott informed Lord Salisbury that "with regard to the continued residence of aliens in Germany, it is held that by International law each State has the power to expel from its territory aliens who may have rendered themselves obnoxious or dangerous to it."[4]

[1] *Life and Letters of Sir Leoline Jenkins*, Vol. II, p. 714.

[2] Speech of Lord Lyndhurst in the House of Lords; *Hans. Parl. Deb.*, Vol. CXXIV, p. 1046; *Is International Law a Part of the Law of England?* Article in *Law Quarterly Review*, Jan. 1906, by Dr. Westlake, K.C.

[3] Parl. Pap. 1887; Col. 5168. [4] *Ibid.*; 5168, p. 29.

Italy and Switzerland (where the right of asylum is maintained on a very high footing) claim a statutory power of expulsion. But in view of the *lacunæ* in the Aliens Act it appears conspicuously relevant that a great and highly civilised country like Germany should merely rely on the right of expulsion as it exists by International law, as England has an absolute right to resort to the same usage. It is, of course, *pomeridiana luce clarior*, that a State, by International law, has the right of expelling an alien who is dangerous to its safety or existence, either in peace or war. Pufendorf and (above all) Vattel are very clear and explicit on this topic.[1]

But while it seems irrefragable that this country could expel an alien by International law, and (perhaps) by virtue of the ancient right at Common law, it is equally patent that the administration of the Aliens Act, and the many *lacunæ* in its provisions, are matters of very pressing urgency, either from the view of public tranquillity or from that of the possibility the present state of affairs engenders of foreign complications. One has only to recur to the crisis arising out of the *attentat* of 1858 to realise that the indiscriminate reception of disaffected aliens may be a cause of war.

A few months after the Aliens Act had come into operation, the Earl of Halsbury pointed out in the House of Lords that the Aliens Act contained an express direction that the intending immigrant should "prove" that he was seeking admission solely to avoid persecution or punishment on religious or political grounds. But, the same high authority proceeded to observe, "according to the instructions of the Home Secretary, whenever there was a doubt, leave to land must be given, and this might occur where the immigrant offered no proof at all." The Earl of Halsbury then proceeded to observe that "the whole subject was one

[1] *De Jure Nat. et Gent*, 3, 3, 9. ; *Droit des Gens*, Book II, ch. 9, s. 125.

of a more serious character than appeared to be imagined. It was whether a state of law had been created by the Secretary of State directing persons under his command to disobey the Act of Parliament."[1] The Bill of Rights declared: "That the pretended power of suspending laws, and the execution of laws, by regal authority without consent of Parliament is illegal."[2] The instructions of the Home Secretary, directing that an alien steerage passenger seeking admission into the country should be given the benefit of the doubt, for the latter object, on the question whether he is "a political offender" or not, appears to proceed upon the principle that the inquiry whether an alien immigrant is undesirable or not is a criminal charge. But there is no doubt that this is not the case, according to the intention of the Act, as declared by two of the members of the Government—the late Prime Minister and the Attorney-General—who were clearly its authorised exponents.[3] If it was a case of criminal proceedings, as the shifting of the *onus probandi* on the alien[4] does not alter the rule as to the weight of the evidence in criminal cases,[5] the prosecution would still have to prove that the alien was undesirable beyond all reasonable doubt. But as the inquiry whether an alien immigrant is undesirable or not is a purely administrative inquiry (to quote Mr. Balfour's language), it appears clear that the effect of the *onus probandi* being shifted is to create a statutory requisition that the alien shall prove that he is a political or religious refugee on the preponderance of probabilities—a very high degree of proof. The protests that have been made from time to time at the maladministration of the

[1] *The Times*, March 23rd, 1906.

[2] Hallam's *Const. Hist. Engl.*, Vol. II, p. 267.

[3] *The Times*, July 4th, 1905.

[4] Aliens Act, s. 7, ss. (5).

[5] Per Holroyd, J., in *R.* v. *Burdett* [1820], 4 B. & A. 95, 140. *Stoddart's Case* [1909], 2 Cr. App. R., 217.

Aliens Act acquire the greatest significance in view of the Tottenham outrage, in which two absolutely innocent persons were killed and seventeen wounded. Mr. Gladstone has stated that the offenders came to this country as seamen, and that the police had no evidence that they were anarchists.[1] Seamen are not liable to inspection under the Act; but it appears from a leading article in *The Times* that the identity of the offenders was absolutely established, and that they were members of a lawless and dangerous Russian revolutionary party which had its headquarters in London.

Vattel excepts from the benefit of the right of Asylum poisoners, assassins, and incendiaries by profession, *i.e.*, persons whose methods are in all respects indistinguishable from those of the modern anarchist.[2] International law is part of the law of England, and in a case arising out of the Café Véry explosion in Paris, Lord Collins, M.R., and Mr. Justice Cave refused an application for a writ of *habeas corpus* on the ground that an anarchist offence was not a political offence, and that a person charged with such an offence could be surrendered to a foreign Government under the Extradition Acts, 1870 to 1873.[3]

It has been noticed that there is some controversy as to the identity of the perpetrators of the Tottenham outrage. It certainly was stated at the time that one of them had committed an extradition crime; and the recent speech of the Home Secretary is perhaps consistent with the fact, though it is inconsistent with concluding that an application for extradition had been made.

It seems the more consistent to conclude that an anarchist cannot claim the benefit of the right of asylum under the Aliens Act, as the express object of the earlier Aliens Acts, 1793 to 1848, was a political object, and not merely a social

[1] *The Times*, Feb. 26.
[2] *Droit des Gens*, l. I, ch. xix, p. 109, Chitty's translation.
[3] *In re Meunier* (L. R. [1894], 2 Q. B. 415).

or economic object, like that of the present Act. The previous Acts were aimed at both the exclusion and expulsion of persons who constituted a danger to public tranquillity, because they were propagandists of the ideas of the French Revolution, which can only not be confounded with the ideas of anarchy by the merest euphemism, at least according to the opinion entertained of the ideas of the French Revolution by the great majority of statesmen in this country at that time.

In a speech on the Aliens Bill of 1793, Lord Loughborough, shortly before he became Chancellor, stated in the House of Lords that the massacres of September, 1792, were perpetrated by not more than 200 persons, in the midst of a city containing 600,000 inhabitants, with 30,000 men under arms. He therefore argued that although the disaffected be few, they must not be despised.[1]

In *R.* v. *Gallagher*,[2] it was pointed out by Lord Coleridge, L.C.J., and Lord Esher, M.R., that the means of warfare were so far improved that three or four men could use the same violence against a Government that it took a great many men to do before, and, therefore, that three or four men could "levy war against the King within the meaning of the archaic language of the Statute of Treasons, 1350, which has also to be construed judicially at the trial of an indictment for treason-felony."[3] The relevance of this conclusion to the alleged presence of hundreds of terrorists in London at the present day is as obvious as it is significant. *Absit omen.*

It is a *reductio ad absurdum* to claim the right of asylum for persons who, like the anarchists, are dangerous to public tranquillity because, in the past, as Edwin James, K.C., observed in his historic defence of Bernard, it has been extended to the Saurins and the Romillys. It may be, on

[1] Campbell, *Lives of the Chancellors*, Vol. VIII, ch. 171, p. 113.
[2] [1883], 15 C. C. C. 291, 314.
[3] Stat. 11 & 12 Vict., c. 12.

the other hand, most justly questioned whether technical acquittals involving the most flagrant miscarriages of justice constitute anything like the public danger and affront to justice implicit, in allowing an alien anarchist to either evade the Aliens Act by borrowing £5 *pro re nata*, or by coming over in a ship carrying less than twenty associates.

The shipping of known criminals to the United States is regarded as a violation of the comity which ought to characterise the intercourse of nations, and should be prevented by every proper measure.[1]

A little known incident in English history appears to justify the conclusion that the shipping of criminals to a foreign country may be regarded as an act of war. In 1797, when there was war between France and England, the French Directory despatched four vessels carrying 700 ragged convicts who were flung ashore at Fishguard Bay, in Pembrokeshire, only to surrender within a very few hours to Lord Cawdor, at the head of a body of 3,000 troops.[2] This expedition did much more damage than it is usual to see stated in the books on English history. Not only were several merchantmen scuttled in Ilfracombe harbour, but after landing at Fishguard the convicts gave themselves up to pillage. The motive of this expedition has never been fully explained, and was at the time regarded as highly mysterious. The four vessels, including three large frigates, put to sea immediately the convicts had effected a landing; and the French commander informed Lord Cawdor that the circumstances under which they landed rendered military operations unnecessary, as they could only lead to bloodshed and pillage. The proportions of the expedition equally forbade the conclusion that any operations of war were seriously intended; the only evidence of this being that they brought enough ammunition to fill seventy carts. While the

[1] *Digest of the Int. Law of the United States*, Vol. II, p. 256.
[2] *Ann. Reg.*, 1797, p. 88.

motive may have been to prove the practicability of invasion in the face of the vast fleets England then maintained; a probable surmise is, that it was also part of the policy of recrimination and insult that then characterised the relations of France with England, for the former country to cast its convicts on our shores.

In spite of the *lacunæ* in the Aliens Act, it has indubitably produced some effect in the right direction. A year after its passing there was a decline of 20·47 per cent. in the number of alien convicted prisoners in England and Wales; and Mr. Gladstone has stated that between 1904 and 1907 there has been a decrease of 1,753 in the number of aliens convicted.[1]

There is also considerable ground for satisfaction when the relevant estimates under the Act—the number admitted after satisfying the full requirements under the first section —are inspected. The number of alien steerage passengers has steadily dwindled in three years from 27,639 in 1906 to 13,051 in 1908. On the other hand, it it unsatisfactory to note that alien steerage passengers are fully cognizant of the loophole in the Act which enables those who only come over in small numbers to escape inspection. Persons of the latter description now constitute two-fifths of all the alien steerage passengers who, it must be presumed, intend to settle here, while two years ago they were little over a third.

Putting it broadly, the number of alien steerage passengers who in three years have settled in this country has fallen from 38,527 to 21,777. This includes both those who legitimately were out of the category of the prohibitions against landing, having satisfied the requirements, and those who evaded those prohibitions by coming over in small numbers. It is scarcely conceivable that a country has existed in history into which immigration ought to be more discouraged than England at the present day. This is an

[1] Parl. Deb., *The Times*, Feb. 26th, 1909.

immediate inference from some very weighty and relevant passages in Pufendorf. On the other hand, it might be sound policy to encourage immigration into Ireland; but on this subject no information can be gathered from the Aliens Act statistics. During the three years the Aliens Act has been in operation, the total number of aliens either refused leave to land or expelled was 2,863. It is submitted that this last estimate is very unsatisfactory. But the enormous diminution in the number of alien steerage passengers coming over in either immigrant or non-immigrant ships, shows that the Aliens Act of this country is having an even greater effect than that of the United States at the ports of embarkation.

After the lamentable calamity at Tottenham, described in *The Times* as "singularly rare, if not without parallel in a civilized country," a calamity which resulted, in the pathetic language of former indictments for high treason, "in a miserable and cruel slaughter of and amongst the faithful subjects of our lord the King," it is far too late to deny that the time has come for requiring, at least, a stricter administration of the Aliens Act. Many of the so-called rebellions of the first half of the nineteenth century resulted in much less loss of life than the Tottenham outrages, where four persons were killed (including the two offenders) and at least fourteen wounded. This lamentable roll was of course exceeded in occurrences like the Bristol riots of 1831, where 100 were killed,[1] or even at the Belfast riots of the eighties. The Tottenham murders resulted in more loss of life and offences against the peace than either the Derbyshire insurrection of 1817,[2] the Monmouthshire insurrection of 1840, or the Irish rebellion of 1848.[3] To employ the language of the ancient indictments, the Derbyshire insurrection was an instance of *bellum levatum* merely, and not of *bellum percussum*.

[1] Trial of Charles Pinney [1832], *St. Tr.*, N. S., 2, 43 and note.
[2] How., *St. Tr.*, N. S., 755, 790.
[3] *St. Tr.*, N. S., 2, 66.

The question of alien seamen possesses considerable interest in connection with the Tottenham outrages, as it appears the two offenders were seamen. As seamen are not steerage passengers, here again the Aliens Act is entirely inoperative.

There is, however, proceeding from the indirect consequences of a crime that rivals in atrocity the Tottenham outrages, (the case of a murder by a foreign seaman tried about fifty years ago before Lord Blackburn,) considerable reason to suppose that police precautions might effect something to secure public safety. In that case, a young Spanish sailor, apparently without the slightest provocation, fatally wounded two persons in a thoroughfare in Liverpool with a knife. The ferocity of the act was alluded to by Lord Blackburn in his summing up; and this led to a notice being circulated in seven languages warning alien seamen of the consequences of using knives.

Among the *lacunæ* in the Aliens Act, it may be observed that it provides no increase of punishment for disobeying an expulsion order on a second offence. Every one of the previous Aliens Acts, 1793 to 1848, provided additional punishment in this contingency.

Finally, it is submitted that everything tends towards conclusion that the alien should be deprived, if necessary, by express enactment, of the benefit of the doubt on the point whether he is a political offender or not.

History and International law are alike clear that the maintenance of the Right of Asylum, at least when exercised in favour of persons whose actions are unconstitutional, may involve both internal and external danger to a State. It has often proved an entirely thankless task; and the assertion of the Right of Asylum by one State may conflict with the Right of Self Preservation in another State, and the latter is the first law of nations.[1]

[1] Phill. *Int. Law*, Vol. I, sect. 213.

It has been seen that there is some doubt as to the identity of the perpetrators of the outrages at Tottenham, though it was stated in *The Times*, it was thoroughly well established that they were Letts. This recalls the fact that Lithuania for centuries formed an integral part of the Kingdom of Poland; and that, beyond all question, this country has rendered more services than any other to that unhappy country, by calling on Russia, so late as 1863, to fulfil her stipulations under the Treaty of Vienna, by which many substantial emblems of independence were reserved to Poland.[1]

The events arising out of the *attentat* of 1858 show the thankless task of asserting the Right of Asylum. Lord Derby observed in the House of Lords that Orsini and his associates had basely and ungratefully rewarded this country for the shelter and asylum it had given them by nearly bringing about a war between France and England. An offence against the Foreign Enlistment Act may, in the language of Lord Russell of Killowen, lead to consequences which no man can foresee; and the history of the two subjects of foreign enlistment and the right of asylum shows that they are frequently, and indeed perhaps necessarily, implicated.

N. W. SIBLEY.

VI.—SOME CASES IN THE LAW RELATING TO THEATRES.

IT may be safely said that the great majority of the British public who go to theatres, properly licensed and pay for admission, on the invitation extended to them by advertisement and otherwise, have got a very ill-defined and exaggerated notion of what their so-called rights are inside a theatre—seeing that the charge imposed for admission

[1] *Ann. Reg.* 1863, pp. 287 90.

thereto, and the payment thereof, do not confer upon members of the public an unlimited and unqualified right to conduct themselves in any manner they please. A popular notion exists that they have a constitutional right to express and give vent to their feelings in any manner they choose, and that they have a right to annoy, and even terrify the audience at their will. Such a right is unknown to the law and therefore non-existent. That they may approve or disapprove of an actor's performance, and express their approval or disapproval audibly, within certain well-defined limits, without breaking the law, is clear. But, it would appear, that disapproval must be fair and honest, not calculated to alarm the audience, to disturb the peace, or create a riot, and must be expressed at the time, because a pre-conceived arrangement come to between a number of people to go to a theatre for the express purpose of hissing an actor, baiting an author, or impeding the performance of a play, is a criminal offence, and by the law of England they can be indicted for conspiracy.[1] In *Regina* v. *De Leuville*[2] the defendant was charged at Marlborough Street with creating a *claque* at the Princess's Theatre. He alleged he did so because one of the actors impersonated him. This was held to be no defence, and the magistrate committed him for trial.

It may be convenient to consider the authorities bearing upon this branch of the law. The leading case upon the subject is *Clifford* v. *Brandon*,[3] which was an action for assault and false imprisonment. The plaintiff, who was a gentleman of great eminence at the Bar, on October 31st, 1809, between nine and ten in the evening, went into the pit of Covent Garden Theatre, which had been lately rebuilt. On this, as on every night from the first opening of the house, great noise and confusion prevailed, on account of the prices of admission to the pit and boxes being raised, and the public

[1] *Gregory* v. *Duke of Brunswick*, 1 C. & K. 24, 16 Scott. N. R. 809.
[2] *The Times*, 17th April, 1890. [3] [1810], 2 Camp. 358.

being excluded from a number of boxes which were let to particular individuals for the season. The performers on the stage were inaudible; the spectators sometimes stood on the benches, and at other times sat down with their backs to the performers; while the play was being presented, "God save the King!" and "Rule Britannia!" were sung by persons in different parts of the theatre; horns were blown, bells were rung, and rattles were sprung; placards were exhibited, exhorting the audience to resist the oppression of the managers; and a number of men wore in their hats the letters "O. P." or "N. P. B.," meaning "*Old Prices*" and "*No Private Boxes*." But, although there were some sham-fights in the pit, no violence was offered to any person, either on the stage or in any other part of the house; and no injury was done to the theatre itself, or to any of its decorations. When Mr. Clifford entered, there was a cry of "There comes the honest counsellor!" and, a passage being opened for him, he went and seated himself in the centre of the pit. Soon afterwards, a gentleman asked him if there was any harm in wearing the letters "O. P." He answered, "No." The gentleman then asked him, if he had any objection to wear them himself. He said he had not. The letters "O. P." were then placed in his hat, and he put it on thus ornamented. He continued, however, to sit without taking any part in the disturbance; and he persuaded a person who was near him to desist from blowing a trumpet. Having conducted himself in this quiet manner while he remained in the theatre, he was retiring from it. Whether or no the performance was entirely over at the time, did not certainly appear. When he had got about two yards from the pit door, where the money is received, the defendant, who was a box-keeper to the theatre, ordered him to be taken into custody. A constable accordingly laid hold of him, and carried him to the police office in Bow Street, before Mr. Read, the magistrate

presiding there; but nothing being proved against him, except that he wore "O. P." in his hat, after being detained about half-an-hour, he was set at liberty. The question was, whether these facts proved the justification for the plaintiff's arrest. It was argued for the plaintiff *inter alia* that there had been no riot in the theatre: that he took no part in the disturbance; that the plaintiff had not instigated it, if there was; that instead of encouraging the supposed rioters, he prevailed upon a gentleman near him to desist from blowing a trumpet; and that, at all events, he had been illegally arrested and imprisoned after the riot had ceased. By wearing "O. P." in his hat, he simply expressed his opinion, that the old prices were sufficient, and ought to be restored. If this were illegal, it would soon be a misdemeanour to wear a blue cockade at an election, or a white favour at a wedding. But, *esto*, that he was then guilty of a riot and breach of the peace, the arrest was equally illegal, because at any rate the riot had ceased, and he had withdrawn from the scene of action. He therefore could not be arrested without a warrant granted by a magistrate after an information laid before him upon oath. Mansfield, C. J., in charging the jury said—"The first great question for the consideration of the jury will be whether the plaintiff was instigating a riot in Covent Garden Theatre on the evening in question, and then they must determine whether he was arrested while the riot continued. As to the existence of a riot in the house, no doubt can be entertained. It appears that for a great many nights there were riots there of such a nature as to put an end to dramatic representation. I cannot tell upon what grounds many people conceive they have a right, at a theatre, to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessaries of life; and any person may stay away who does not approve of the manner in which they are managed. . . .

It is said, if the prices asked are considered too high, people have a right to express their disapprobation in the tumultuous manner they have adopted. From this doctrine I must altogether dissent. . . . It is time for the public to understand that the proceedings which have lately taken place at this theatre are in a high degree illegal, and that all those who participate in them are liable to be punished severely, in proportion to their offences. . . . . The audience have certainly a right to express, by applauses or hisses, the sensations which naturally present themselves at the moment. and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment. . . . . I am clearly of opinion that the scenes which have been described amount to a riot. . . . The jury will consider, then, whether Mr. Clifford was an instigator of the riot, which one of his witnesses has represented as resembling a quarrel among a thousand drunken sailors. The law is, that if any person encourages or promotes, or takes part in riots, whether by words, signs, or gestures, or wearing the badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace. In this case all are principals." . . . His Lordship concluded by asking the jury to state their opinion separately as to (1) whether the plaintiff had instigated the riot, and (2) whether the riot was over before the arrest. The jury, after retiring, found a verdict for the plaintiff, with £5 damages, on the grounds, (1) that the arrest was illegal, (2) that the riot was over, and (3) that the wearing the letters "O. P." in a theatre was not any instigation to a riot. The verdict was in direct contradiction to the facts as proved, and to the law as laid down by the Chief Justice.

The case of *Lewis* v. *Arnold & others*[1] illustrates the futility of a member of the audience taking the law into his own hands, and taking the wrong remedy to right a real grievance. In this case the plaintiff went to the pit of the defendant's theatre (the English Opera House) at half-price, on the evening of August 1st, 1829. The evidence as regards whether or not the pit was crowded was conflicting and contradictory. According to the plaintiff the pit was crowded, and the plaintiff and two other persons climbed from the pit into a private box. They were told that they must not stay there, unless they paid £2 : 2s., which was the price of the box. They refused, and the plaintiff and the two other persons were taken out of the private box through a lobby which led into the street. One of the two other persons then asked to be suffered to go back into the pit. They were told that on going round by the street they would again be passed into the pit by a servant of the theatre, who would go round with them. This the plaintiff refused to do, and insisted on going back to the pit by the way he had come from it; and in the dispute one of the other two persons, and not the plaintiff, gave a servant of the theatre a blow, whereupon the plaintiff and the other two persons were taken into custody. Tindal, C.J., in summing up, said: "Even if this plaintiff had been informed there was room in the pit of this theatre, when there was not, which on this evidence is matter of doubt, he had still no right to go into this private box. His proper course, if there was not room, was to go out of the theatre and demand the return of his money . . . . It then becomes material to consider, whether the plaintiff was acting jointly with the other person, or committing a breach of the peace in the presence of the constable. It is said that the plaintiff himself did nothing; that, no doubt, is so. But the question is, did he withdraw himself from the others, or were they

[1] [1830], 4 C. & P. 354.

all active in one common purpose? It appears that they had all then got into the private box together, and they were all together in the lobby, and I cannot find anything to separate the plaintiff from the other two. If, therefore, you think that these three persons were acting in a common purpose, the plaintiff was liable to be apprehended, although the blow was not given by him, but by one of the other two persons who were with him." Verdict for the defendants.

Even outside a theatre managers may come into conflict with the public, and there is a duty cast upon managers of theatres to see to it that the crowds or *queues* of people waiting outside the pit or gallery doors before they are opened do not cause a nuisance to the tenants of adjoining properties. If they do so, such a nuisance may be restrained by an injunction. This was well illustrated in a recent case, *Barber* v. *Penley*.[1] This was a motion for an injunction to restrain Mr. Penley, the lessee and manager of the Globe Theatre, from carrying on his theatre so as, by causing crowds to be assembled, to obstruct the access to or egress from the plaintiff's premises in Wych Street, W.C., or to interfere with or obstruct the plaintiff in the conduct of the business of a lodging-house keeper carried on by her on her said premises. The plaintiff was the keeper of a lodging-house for working-men. The only access to her premises was through a door adjoining the pit entrance of the Globe Theatre. The plaintiff's case was that access to her premises was obstructed at the time at which her customers usually came, by the collection of crowds of people who began to assemble at 5.30 p.m., two hours before the doors of the theatre were opened, and who occupied the entire pavement in front of her premises. North, J., (in a learned judgment reviewing all the authorities on allied subjects of nuisance), said, in giving judgment for the plaintiff, ". . . . Then it is said that the

[1] 62 L. J., Ch. Div. 623.

defendant cannot help the crowd collecting in front of the plaintiff's premises. But if, in point of fact, a nuisance exists which is caused by him by reason of the entertainment which he carries on, and to which he invites the public to come, it seems to me that he must either discontinue his performance or the nuisance must be prevented. .... The police have taken the matter in hand, and there is no reason whatever to anticipate that they will not duly perform their duties and prevent any nuisance arising in future. .... If he (*i.e.*, the defendant) had claimed a right to obstruct, I certainly should have granted an injunction; but as he does not claim that right, I do not think that an injunction is necessary." The defendant was ordered to pay the plaintiff's costs.

The vexed question as to whether, if one of the audience leave his seat, can he retain it by placing an article on it, although it is not reserved—*i.e.*, in the sense of its being booked—has been decided in a recent case in the affirmative by the magistrate at the Lambeth Police Court. The defendant entered the theatre some hours after the performance had commenced, and claimed two unreserved seats that had been temporarily left by the original occupants, who had left a coat, and also a lady, in charge of the seats. The defendant in the case refused to move when requested to, on the ground that the seats were not numbered and reserved, and the learned magistrate ruled that it was an unwritten law with all Englishmen that the first occupiers of seats under such circumstances were fully entitled to retain them. Another case on seats in theatres is *Pollock* v. *Moss' Empires, Limited*. This case was tried at Westminster County Court. The plaintiff, who was a solicitor of Bedford Row, and three relatives, sought to recover 25*s*. each as damages against the defendants. The plaintiff said he purchased four tickets, at 5*s*. each, for October 26th, for the London Hippodrome. They

were numbered in "B" row. On his going there, with the three ladies, he found the seats occupied, and, though he was offered a box and his money back, he contended that he was entitled to the seats he had paid for, and they ought to have been kept for him. For the defendants, it was said that there had been an unfortunate mistake, and that they had offered to give the plaintiff a box of the value of two guineas, and to return the money, which was refused. The learned County Court Judge (Lumley Smith, Q.C.) upheld the plaintiff's contention, and gave judgment for the plaintiff in each case for £1 damages and costs.

The Workmen's Compensation Act, 1897, it has been held in a County Court case (Westminster), does not apply to theatres. In *Fredericks* v. *The Grand Opera Syndicate*,[1] the plaintiff was a workman employed by the defendants at Covent Garden Theatre. While the plaintiff was, in the course of his employment, hoisting a heavy piece of scenery, the gear gave way, and the scenery fell upon him, causing him injuries. The plaintiff (who appeared in person) argued that, as scenery was manufactured and warehoused on the premises, a theatre was a factory or warehouse within the meaning of the Act. It was decided that the property-room of a theatre could not be construed to be a factory or warehouse within the meaning of the Act, and judgment was given for the defendants. And in *Burr* v. *Theatre Royal, Drury Lane, Limited*,[2] which was an application by the plaintiff for a new trial in an action tried before Grantham, J., with a jury, plaintiff was engaged by the defendants, a theatre company, to perform in the chorus in a pantomime. At the close of a performance the plaintiff was, in leaving the stage, passing by a place where scene-shifters were shifting the scenery, when she was injured by something which fell on her head. At the trial, evidence was given for the plaintiff

[1] May, 1900 (unreported). [2] L. R. [1907] 1 K. B. 544.

of the above facts, but there was, in effect, no further evidence to show how, or by whose negligence, the accident was caused. It was decided that the case came within the rule that a person employed impliedly undertakes, as incidental to his employment, the risk of negligence on the part of a fellow employee engaged in the same employment, and that, as the plaintiff had adduced no evidence to show that the accident had been caused by the negligence of the defendant company, or of any person for whose negligence they would be responsible, the action was not maintainable. The Master of the Rolls said: "I think that this case comes within the principle which is the basis of the doctrine of common employment," and his lordship referred to *Johnson* v. *Lindsay & Co.*[1] and *Hedley* v. *Pinkney & Sons' Steamship Co.*[2]

One of the leading cases in regard to theatrical contracts is *Lumley* v. *Gye.*[3] In this case the plaintiff was the lessee and manager of the Queen's Theatre, who had contracted and agreed with Joanna Wagner to perform at his theatre for three months, and the defendant enticed the said Joanna Wagner to break her contract with the plaintiff, who sued the defendant for damages. It was held that the plaintiff had a right of action for damages against the defendant. *Lumley* v. *Gye* (cited *supra*) arose out of the facts contained in the action of *Lumley* v. *Wagner.*[4] *Lumley* v. *Gye* was approved in *Bowen* v. *Hall*[5] (Selborne, L.C., and Brett, L.J., Lord Coleridge, C.J., *dissenting*). The decision in *Bowen* v. *Hall* has been doubted by the House of Lords in *Allen* v. *Flood.*[6] In *Lumley* v. *Wagner*, one of the leading cases on injunctions and theatrical contracts, the plaintiff obtained an injunction against Mdlle. Joanna Wagner, who wished to perform for Mr. Gye. It illustrates the rule of the law of such

[1] [1868], L. R., 1 H. L. Sc. 326; at pp. 331, 332.
[2] L. R. [1894], A. C. 222.
[3] [1853], 2 E. & B. 216.
[4] 1 De G. M. & G. 604.
[5] 6 Q. B. D. 333.
[6] L. R. [1898], A. C. 1.

contracts that there must be an actual negative clause in the contract that the actor will not perform at any other theatre; otherwise the actor cannot be restrained by injunction from so doing. In *Kelly* v. *The London Pavilion, &c.*,[1] which were three actions tried together, the question was whether the clause in a contract, "not to perform elsewhere," prevented an artiste from performing on Sunday at a club, for which performance she received no remuneration. The plaintiff claimed damages for wrongful dismissal and breach of contract. In this case the plaintiff, a girl of fifteen years of age, was a music-hall artiste, whose professional name was Sybil Arrundale, and the defendants were the London Pavilion Limited, the Oxford Limited, and the Tivoli Limited. The defendants engaged the plaintiff to perform at their music-hall, at a salary of £24 a-week in all. On the evening of Sunday, January 10th, 1897, she sang a song, and gave a dance, at the New Lyric Club, where a concert was being given upon the invitation of the committee. The defendants thereupon, on the Monday, declined to allow her to perform at their music-halls, on the ground that the plaintiff had broken her contracts with them by performing at the New Lyric Club without having obtained their permission. It was decided by Hawkins, J., that the clause in the contracts did not prevent the plaintiff performing at the said club on the Sunday; that, consequently, the plaintiff had not broken her contracts with the defendants, and that the plaintiff was entitled to a verdict and judgment, with £32 damages, against each of the defendants; and one set of costs was allowed after the close of the pleadings.

In conclusion, reference may be made to *Grant & Maddox*,[2] which deals with what is called the "custom of the profession." The plaintiff, an actress who was engaged by the defendant, the lessee and manager of the Princess's Theatre, to act for three years, at a progressive salary, sued the defendant for

[1] [1897], 13 Times L. R. 584.

[2] 15 M. & W. 737.

£114—twelve weeks' salary for the first year, amounting to £60, and nine weeks' salary of the second year, amounting to £54. The defendant adduced evidence to show that the term *years* in theatrical contracts meant *seasons*. The Lord Chief Baron, in summing up, told the jury this was the question they had to decide. The jury returned a verdict for the defendant. The lady obtained a rule for a new trial, but it was decided by Alderson, B., Rolfe, B., Platt, B., and Pollock, C.B., that the defendant was entitled to judgment. The plaintiff was non-suited.

G. ADDISON SMITH.

VII.—CONSTRUCTIVE MURDER AND FELONIOUS INTENT.

ANY student of the Criminal law of this country must—if he be not, indeed, merely directing his energies to the satisfaction of importunate and inquisitive examiners—be impressed at times by the wide and varied construction placed upon certain words of our language. Exaggerated constructions are neither the monopoly of politicians nor theologians. If he possesses, in addition to a contemplative mind, a true philological instinct, he will be the recipient of rude and unaccustomed shocks. If he is also the proud possessor of the faculty of research, and devotes himself to an inquiry concerning the authorities upon which certain of our criminal doctrines rest, his wonder will increase, and, to some extent, his respect will diminish.

The phrase, "malice aforethought," as applied to the crime of murder, affords us a striking illustration of this. Comprehensiveness stands forward as the *apologia* for its occasional incomprehensibility. The interpretation of the term is so wide as to include all the peculiar forms of

mens rea which justify a verdict of murder in the case of unjustifiable homicide. There is, however, one peculiar and unusual form of *mens rea* (and it is one of great practical, as well as theoretical, importance) which has been frequently stated to be sufficiently strong to constitute "malice aforethought" in the case of murder. It arises where unintentional homicide results from the prosecution of a felonious design. All the authorities agree that, if the felonious act is one intrinsically likely to kill, even though there be no intent to kill, yet it would be murder. That is not the question with which we are now concerned. If unintentional homicide results from the prosecution of a felonious act of itself intrinsically unlikely to kill, can it be said to be murder?

This is a question of considerable historic interest. It has allowed Foster to dissociate himself from the views of Coke, it has given Kelyng, C.J., Holt, C.J., and Sir James Stephen an opportunity to violently denounce the statement of the law in the *Institutes;* it has enabled one judge to describe the law upon the point as ridiculous, and another to describe it as unreasonable. It has been the legitimate parent of many an ambiguous passage. It has for many years harassed judges, perplexed juries, and aggravated prisoners.

A brief consideration of the question in the light of recent decisions may not, perhaps, prove uninteresting. The authority usually quoted for this rule is Sir Michael Foster. In his *Crown Law*, he observes, "If an act be done in the prosecution of a felonious intention and death results it will be murder, but if the intent went no further than to commit a bare trespass, manslaughter. Though I confess Lord Coke seemeth to think otherwise."[1] The illustration which he gives of this, is that of a man shooting at a fowl in order to steal it, and thereby accidentally killing a bystander.

[1] Foster's *Crown Law*, 258.

This, he says, will be murder, although if the intent had been merely to kill (and not to steal) the homicide would only amount to manslaughter.

This view of Foster's is doubtless based upon, or at any rate influenced by an *obiter dictum* of Holt, C.J., in the case of *Rex* v. *Plummer*[1] in the year 1701. He said in that case, "the design of doing any act makes it deliberate; and if the act be deliberate, though no hurt to any person can be foreseen, yet if the intent be felonious, and the fact designed, if committed would be felony, and in pursuit thereof a person is killed by accident, it will be murder in him and all his accomplices." It is worthy of note that no authority is given to support this *dictum*, and it is, indeed, difficult to understand where such authority could be found. It should also be remembered that at the time Foster laid down the rule, and even for a goodly number of years after that time, a great number of felonies were capital crimes. It is evident that the rule would not thus appear to Foster to be the "cruel and monstrous" doctrine which it appears to us to be to-day.

Lord Coke states, without any qualification (and he gives illustrations), that where intentional homicide results from an unlawful—mark the word—unlawful act, it would be murder.[2] He thus does not only limit the application of the rule to acts *mala in se*, but to acts *mala prohibitum*. It is this statement of the rule that provokes Foster to express dissent, and it was probably the cause of the *dictum* of Holt, C.J., in the above case.[3] Indeed in one case, *Rex* v. *Keate*,[4] he expressly states that Coke's view of the law was incorrect, and that "there must be a design of mischief to the person, or to commit a felony or great riot." The statement of the law by Lord Coke has been severely criticised by many learned authorities.

[1] Kelyng, 155. See also Stephen's *History of the Criminal Law of England*, Vol. I, p. 273.

[2] *Coke's Institutes*, p. 56. [3] *Supra*. [4] Comb, 406, 409.

Sir John Kelyng devoted much space to showing that in his opinion it was necessary that the act committed should, if an indictment for murder was to be substantiated, amount to a felony.[1] Hale limits the application of the rule to cases of felony, and says, without referring to Coke, that if the act committed be merely unlawful there could be no case of murder.[2] East, although dealing (perhaps wisely) with the rule in a somewhat indefinite and inconclusive manner, inclines one to the opinion that his view was, that the felonious act committed must be of a nature which might reasonably be expected to result in death.[3]

Sir James Stephen characterises the statement of the law as a monstrous doctrine, and one which rested upon little or no authority.[4] In *A General View of the Criminal Law of England*[5] he not only dissents from Coke's view, but expresses great doubts as to whether a felonious act could result in murder unless the felony was in itself an act likely to result in death. And again, in commenting upon Foster's statement he observes, "Cruel and indeed monstrous as such an illustration may appear to us, it is put forward by Foster as a mitigation of the views of Coke, and such no doubt it is. It certainly is less objectionable to say that unintentional homicide committed in the prosecution of a felonious design is murder, than to say that unintentional homicide committed by an unlawful act is murder."

Those cases which have afforded a consideration of the principle indicate much complication and display no little ambiguity.

In *Lad's Case*,[6] decided in the year 1773, the judges met together at Serjeants-Inn Hall to consider *inter alia* whether an indictment for murder could be maintained where death had resulted from rape. They refused to express any opinion upon this broad question. This, remembering that

[1] Kelyng, 111.
[2] Hale's *Pleas of the Crown*, 474. [3] East's *Pleas of the Crown*, 230.
[4] *History of the Criminal Law of England*. [5] P. 141. [6] Leach, C. C. 96.

rape is a personal attack, which of necessity involves considerable force, and thus increases the likelihood of death, is undoubtedly significant. The real and vital question is, was the act one which might reasonably result, in the case of an ordinary person, in death? Any felonious act which necessitates actual personal violence is much more likely to result in death, and to create in the mind of the offender a knowledge that it might so result, than is a felonious act which of itself could never reasonably be expected to result in homicide. Thus the inference which may readily be drawn from the decision of the assembled judges so early as 1773 is justified.

A great criminal authority speaking of Rape says, "That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That, I take, to be the true meaning of the law on the subject."[1] This is, of course, the law to-day. The case of *Reg.* v. *Gilbert*,[2] well known as the Fordingbridge murder, illustrates forcibly the rule that if a person dies as the result of rape, the offender is liable to be indicted for murder. The Commissioners who were appointed to consider the Law relating to Indictable Offences quote and commend this case. They are empathic in their statement that death resulting from rape should constitute murder, and observe that they " believe there are few who would not think the law defective if such an offence was not murder."[3]

In the case of *Rex* v. *Wiggs*, in 1784,[4] the prisoner was tried upon an indictment for murder. It appeared that a shepherd boy had allowed some of the sheep he was tending

[1] Stephen, J., in *Reg.* v. *Serné and another*, 16 Cox, 311.
[2] *The Times*, 19 July, 1862.
[3] Report of the Royal Commission, 1879, P. 24.
[4] Summer Assizes for the County of Norfolk, 1784.

to escape through the hurdles, and his master, irritated by his negligence, took up a stake that was lying on the ground and threw it at the boy. The stake hit the boy on the head and fractured his skull, of which he died. The learned judge directed the jury, that unless they thought this stake, thus suddenly caught up, was an improper instrument and used by the prisoner with intent to kill, the crime could only amount to manslaughter. The jury returned a verdict of manslaughter. The words "intent to kill" place a much narrower construction upon the rule as laid down by Foster, and this construction makes its appearance in later cases.

In a case of the year 1838,[1] a man had gone to sleep in a barn. His friends covered him with straw, to which they applied a light. He was burned to death, and the prisoners were indicted for murder. Patteson, J., said that if they believed that the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter. In another case,[2] the prisoner was indicted alone for wilful murder. The deceased was found tied hand and foot with string, and something had been forced into her throat by which she had been suffocated. There was a club found and two pieces of wood, indicating the intention of the burglars to use violence if disturbed. The house had been forcibly entered, and the object evidently was robbery. Blackburn, J., said, "As a matter of law, if you are satisfied that when the deceased met her death from violence by any person or persons to enable them to commit a burglary (or any other felony), although those who inflicted that degree of violence might not have intended to kill her, all who are parties to that violence are guilty of murder." It

[1] *Errington's Case*, 2 Lewin, C. C. 21.

[2] *Regina* v. *Franz*, 1861. See also Wightman's, J., remarks, 7 Cox, 404.

must, of course, not be forgotten that in this case there was evidence that violence was intended, if it were necessary to effect the common purpose, and in spite of the words "or any other felony," the concluding words "all who are parties to that violence" would appear to indicate that the direction was really applied to felonious violence.

The case which affords the greatest ground for the principle is that of *Regina* v. *Horsey*.[1] The prisoner had wilfully set fire to a stack of straw, close to an outhouse or barn, in an enclosure not adjoining a dwelling-house. The deceased had been burnt to death, either in the outhouse, or on, or by, the side of the stack. In directing the jury, Bramwell, J., stated that although the law might appear unreasonable, yet if a person in the course of committing a felony, caused the death of a human being, that was murder. It was held that the prisoner was not guilty of murder, unless the person was there when the prisoner set fire to the stack. In sentencing the prisoner for the arson, the learned judge said he should make no difference in the sentence on account of the death of which the prisoner's act had been unhappily, though unintentionally the cause. It should also be noted that the judge laid considerable stress upon the statement that the prisoner was not answerable except for the natural and probable result of his act.

The Members of the Royal Commission of 1879 comment upon the construction placed upon the word "malice." They observe that the question as to whether malice can be implied from an intent to commit a felony, is a question open to doubt. They quote Foster. They then go on to say, "It seems to us that the law upon this subject ought to be freed from the elements of fiction introduced into it by the expression 'malice aforethought,' although the

[1] 3 F. & F. 287. See also *Rex* v. *Evans* [1812], 3 Russ. Cr. 12; *R.* v. *Pitts* [1842], C. & Mar. 284; *Rex* v. *Hickman* [1831], 5 C. & P. 151. *Curley's Case*, C. C. A. R. 2, 109.

principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death, ought to be maintained." In the Draft Criminal Code itself they omit the case of a felony unlikely to cause death, and limit the application of the rule to acts known by the offender to be likely to cause death.

The case which is now generally quoted and relied upon, by those who believe that the rule as originally stated was too wide and based upon little, if any authority, is that of *Regina* v. *Serné and another.*[1] In this case the prisoners, Leon Serné and John Henry Goldfinch, were indicted for the murder of a boy Serné, the son of Serné the prisoner. It was alleged that they wilfully set on fire a house and shop, by which act the death of the boy had been caused. Stephen, J., in directing the jury in that case said, whilst commenting upon the construction placed upon the phrase "malice aforethought," "that the words had to be construed, according to a long series of decided cases which have given them meanings different from those which might be supposed. One of those meanings is the killing of another person by an act done with an intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person . . . . I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now, when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say, a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart, dies . . . . I very much doubt, however, whether that is

[1] [1811], 16 Cox 311.

really the law, or whether the Court for the consideration of Crown Cases Reserved would hold it to be so. . . . I think that instead of saying that any act done with intent to commit a felony, and which causes death, amounts to murder, it would be reasonable to say, that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder."

In *Regina* v. *Whitmarsh*,[1] so recently as 1898, where death had resulted from an illegal operation, Bigham, J., told the jury that if they could think that, though the prisoner had committed the act, yet he had not contemplated that his act could result in death, he was only guilty of the lesser crime of manslaughter. It was necessary, said his Lordship, that the prisoner should have contemplated the possibility of death for it to be murder. In his address to the Grand Jury, at Chester, in 1899,[2] Darling, J., advised the jury in a case of death resulting from an illegal operation, that if they were of the opinion that the operation was performed without any intent or desire to kill, they ought not to return a true bill for murder.

In May, 1903, the case of *Regina* v. *Whitmarsh*[3] was followed in two instances.[4] In one of the cases Lawrence, J., told the jury that they might return a verdict of manslaughter, as the possibility of death resulting from the act committed had not been contemplated by the prisoner.

Thus, there is no doubt, eliminating any question as to the insufficiency of the original authority, that the trend of modern judicial opinion and *dicta* have been toward a limitation of the rule to those felonious acts which are intrinsically likely to cause death. The present unsatisfactory condition of the law upon the question is much to be deprecated. It embarrasses judges in their directions to juries; it may in

[1] 62 J. P. 711. [2] *Regina* v. *Upton*, *The Times*, March 11, 1899. [3] Supra.
[4] *Rex* v. *Pearson*, Manchester Assizes, May, 1903. *Rex* v. *Bottomley*, Liverpool Assizes, May, 1903.

certain cases result in a guilty person being acquitted, if the alternative verdict of manslaughter is not open to the jury. A prisoner may be acquitted of a greater, because he cannot be convicted of a lesser offence. No doubt, when the question arises in the Court of Criminal Appeal, some definite principle will be laid down which may not indicate so greatly the divergence of judicial opinion, the inconsistency of our Case law, and the great weight given to legal writers whose names appear in the text-books as the old authorities.

W. F. WYNDHAM BROWN.

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

Patents Worked Abroad.

THE decision of Parker, J., in *In re Hatschek's Patents* (L. R. [1909], 2 C. 68), in which his lordship lays down a variety of rules as to what constitutes "adequate" manufacturing of a patented article, and "satisfactory" reason for not manufacturing it in the United Kingdom, is clearly one which should be subject to appeal. It is evidently the policy of the executive to subtract disputes from the decision of the Courts, and to substitute, as far as may be, the decisions of officials. Lord Alverstone has recently observed in strong, but not too strong, terms, on this tendency to put the rights of the subject under the control of the bureaucracy. It is a tendency which showed itself very powerful in the matter of public education. The Board of Education is entrusted with summary powers of decision which go far to oust the jurisdiction of the Courts. The Patents Act does, indeed, concede an appeal from the Controller; but it is limited to a single judge, and his ruling is final. No better judge than Parker, J., could be desired.

But the enormous importance and difficulty of defining what is the scope of the statute, is such that the duty ought not to be entrusted to any single judicial person.

In the particular case, Hatschek, a foreigner, patented in 1900 a process for manufacturing thin stone slabs. It was never worked in this country, but in 1908, the patentee advertised his willingness to enter into arrangements for that purpose. Since 1906 it had been worked in Belgium, and simultaneously the patentee had precluded himself from granting anyone a licence to work it in the United Kingdom. Parker, J., revoking the patent, laid down various canons which themselves are by no means free from ambiguity. The section (27) of the Act of 1907 which enables revocation if a patent is not "adequately" worked in this country, and no "satisfactory" explanation given, only applies where the manufacture takes place wholly or "mainly" abroad. Although his lordship was willing to admit that an article was not necessarily "mainly" manufactured abroad simply because more than half the output was so manufactured, and although he laid it down that there must be a great preponderance of manufacture abroad, to bring the statute into play, yet he declined to measure that preponderance by any reference to the wants of the English market. The sole question apparently must be, Was the *quantum* of manufacture in Great Britain "reasonably" extensive? Here we are landed again in the realm of pure arbitrary conjecture. Is it reasonable to expect a patentee to lay down plant to manufacture his patent simultaneously in all countries under the sun? And if not, is it fair to expect that he will give a preference to England? He must do so, in effect, says Sir R. J. Parker: he must use at least as great efforts to develop his manufacturing business in England as elsewhere. It is evident how great a handicap this puts on industry. Where a single factory would be economically adequate, the unfortunate patentee is to set up factories, all

over the world, wherever he wants to secure protection for his idea. For the judge explicitly says that economic, as distinct from political, considerations are to have no scope. That England is not so favourably situated for the manufacture, in respect of cheapness of material, or of labour, is to be no excuse. That profits will be greatly reduced is to go for nothing. If this construction of the statute be right, the neo-protectionism of a Liberal government will have serious effects upon every British consumer.

It may also be doubted whether it is not contrary to convention. In argument it was apparently admitted that such a discrimination against foreigners would be against the terms of International treaties. It was, however, urged that the section was not directed against foreigners, since it would equally apply to British subjects who worked their patents abroad only. But this seems a formal and pedantic justification. If a given measure hits a thousand foreigners to one Briton, it is not easy to see that it is not directed against the former. When Venezuela, in 1881, imposed differential duties on goods "arriving from" Trinidad, Dr. Raphael Seijas asserted, with considerable show of reason, that this was no infringement of the commercial treaty with Britain. It was not against "goods of British growth or manufacture" that the discrimination was levied, but merely against goods "coming from" British territory. But Lord Granville protested very strongly against such an interpretation, and said it would make the treaty nugatory.[1] His arguments apply with much greater force to the present case. In fact, the British contention in the present case would enable any State to evade its solemn obligations to a foreign nation, by legislating against "persons residing in" instead of against "subjects of" that country.

[1] See the British State Papers, vol. 77, pp. 768 *et seq.*

Foreign Trade Marks and Associations.

What is the effect, by comity, of a French law on an English trade-mark? Most people would answer at once, Nothing. But *mobilia sequuntur personam*; and if the view is taken that trade marks are "property," then the law of the owner's domicile becomes of great importance in a case of universal succession. Something very like a universal succession was created by the French law of 1901, which, in the events which happened, divested the members of the monastery of the Grande Chartreuse of their property and passed it to a liquidator. The result was precisely similar to a bankruptcy or a winding-up. Did it carry the English trade-mark of the monastery? The actual liqueur for which the institution was famous was no longer manufactured by the liquidator, who, indeed, could not manufacture it, not possessing the secret of the process: and it is impossible to contend that he could continue to enjoy the protection of the trade-mark for another liqueur which he began to make and to vend under the designation of the old one. That would be a clear fraud on the public.

Such a consideration strongly suggests, what has always been the writer's view, that trade-marks are in no sense property. The imposition on the public, as it was undoubtedly the origin of, is still the essential element of justification for the interference of the Courts in these matters.

The fact is not always recognised; and so obscured is it, that at times the Courts have gone near to setting up a right of property in the owner of a trade-mark, so sacrosanct that anyone who infringes it accidently would be liable in damages. But the right conferred by the user or registration of a trade-mark appears actually to stop a considerable distance short of that. It rests really on the impropriety of allowing one trader to impose on the public by saying that his goods are those of another. In the present case, there

was no doubt that the whole of the property—what could fairly be called the "property"—of the dissolved monastery of the Grande Chartreuse, passed to the liquidator. No considerations of tenderness for the dispossessed owners could possibly weigh with an English Court if it were asked to say that bonds at a London banker's, or altar furniture bought and paid for at Birmingham, had not passed by the law of the monastery's evident domicile to the French State. Yet, obviously, there was a difficulty in holding that the trade-mark passed.

Not only so, but the Court of Appeal, in this case of *Rey* v. *Lecouturier*, felt itself at liberty to hold that the Carthusian Order—not, be it noted, the expelled monks—were entitled to an injunction to restrain the liquidator and his assignees from using it. From this it is to be inferred that the English trade-mark is still properly vested in the proctor-general of the Order. On whose behalf he holds his interest may not be very clear, and the Lord Chief Justice expressly declined to decide it. It is a question which Professor Gierke and his English admirers must settle among themselves. Whether the Carthusian Order, which the law of France certainly could not dissolve, or the community of the Grande Chartreuse, which it certainly could, was the body on behalf of which the registration was made, is a nice question. Presumably, the fact of the registration being made in the name of a high Carthusian official points to the probability of the Order, and not the monastery, being regarded as the producers of the liqueur. And, in fact, it was the Order which successfully sued in England. But then, if it is the Order which is regarded as having a *locus standi in judicio*, who incorporated it? What law, expressly or implicitly, made a person of it? Not the law of England, which knows no such informal incorporation. Not the law of France, which expressly fastened on

the monastery as the body with which it had to deal. Not the law of the Church, for modern States repudiate its authority. Must we fall back upon the Vatican, and declare the Order to derive its existence, as a foreign corporation in England, from the temporal power of His Holiness? If we are prepared, on the contrary, to admit that an amazing revolution has been worked in the English law under cover of a slight change in procedure, and that any and every ephemeral association is virtually incorporated by R.S.O., O. 16, r. 9, it must be realised that Parliament alone is competent to effect such a subversion of juridical ideas. It must, in particular, be carefully remembered that not even a Rule of Court is able to confer immortality upon an association, or the benefit of limited liability upon its members.

It is suggested, with some confidence, that an application to strike out from a writ the name of an association, not incorporated in this country or abroad, would be successful, unless disclosure were made of the full descriptions of all the individuals composing it, who must each be liable *in solidum* for the costs. Otherwise, we are *dans la pleine vague.*

On the question of trade-mark, it is said that the Courts in Germany and in the United States of America have come to decisions, recognising the right to use the mark as residing in the Carthusian Order. It may not be out of place to remind our readers that Lord Westbury's and Lord Cairns' opinion, to the effect that trade-marks are "property" was not unqualified, was in opposition to the view of Lord Hatherley and Lord Langdale, and was virtually explained away by Lord Herschell in *Reddaway* v. *Banham.* The divergence of view is not generally important, because it is admitted that the "property" is a very qualified kind of property. But in such cases as the one before us,

involving conflicts of law, such loose descriptions are apt to assume a vital and disproportionate importance. Sir F. T. Piggott's suggestion, based on *In re King*, is worth remembering; namely, that the rights conferred by an English registration may fall to be determined solely and exclusively by English law, whatever the domicile of the person who registers them. We have assumed that the domicile of the monastery was in France: this can hardly be doubtful, but it is possible that, as has been hinted, the trade-mark was connected, not with the monastery, but with the Order. In that case, it is not easy to see how the French decree could operate on it, or indeed on any property of the monks, which could always be represented as held by them as a *precarium* from the Order.

Quedah.

In the *Law Magazine* for 1901 (p. 437), there will be noticed a reference to the remote Malay State of Quedah—remote alike in geography and in civilisation. As the influence of Singapore spread through the Malay peninsula to the north, it encountered the influence of Siam coming in the contrary direction. Less powerful in material force, and no more powerful in religious sympathy—for the Siamese are Buddhists, the Malayans Mohammedans—the influence of Siam was nevertheless strong in its older establishment and its more intimate character. Singapore secured Pêrák and Pahang, but Siam successfully asserted her right to control Quedah, Kelantan and Trengganu. Her suzerainty over these little States had been of the most misty character, but it was apparent enough to be undeniable. Her own admission to the regular rights of a world Power, accompanied by the reorganisation of her institutions on the European model, and by the employment of distinguished jurists like Rolin-Jaquemyns as her international advisers,

made it impossible to ignore her rights. The possibility that French encroachments from Tonquin and Annam could be stimulated by any British infringement on Southern Siam made it dangerous to infringe them. But now the movement of Siam has progressed still further. The example of Japan is being imitated with an ardour and success hardly realised in England. Siam is on the point of introducing a judicial system satisfactory to occidental ideas: and, as a consequence, she demands the abolition of the capitulations. The price asked by Britain appears to be the cession of Kelantan, Trengganu and Quedah. During the past twenty years Siam has been engaged in transmuting her shadowy suzerainty into an effective administration, like that exercised by Britain in the more southern part of the peninsula. It has been asserted that her administration there is more elastic and better suited to these primitive localities than that of a European stranger could be. But it has only been developed on the north-east. Quedah, on the north-west, has been neglected. It is now alleged that Siam has no rights over Quedah at all, and accordingly no right to transfer that district to the control of Great Britain.

It is a delicate question. Siam did very forcibly assert rights against Quedah some forty years ago. An expedition, in which Englishmen took an active part, was sent, which destroyed a good many Quedah prahas, labelled (perhaps libelled) as "pirates." But, after a few lively weeks, the Siamese forces withdrew, and since that time Quedah has been left severely alone. A firmly-worded memorial has been addressed to the Foreign Office, disclaiming Siamese suzerainty, and denying the right of Siam to hand over Quedah to another Power. On the whole the document appears to have reason. We cannot close our eyes to the fact that supervision in these backward countries means nothing more nor less than annexation. Whatever rights Siam exercised in Quedah, she certainly did not interfere

in every detail of administration as a British resident does. Her last intervention, instanced above, is ancient history, and it led to nothing. Unless there is a presumption *juris et de jure* that a Malay State must be subject to somebody, there seems to be very little colour in the Siamese contention. That there is no such necessity is clear from the case of Johore, which in fact as well as in name is independent of the British Government. At the same time, intervention in unsettled or semi-civilized countries need not, as is well known, be very frequent in order to keep alive as against third parties rights of overlordship. The Portuguese rights at Delagoa Bay were allowed by the arbitrator appointed to decide them, on the ground of acts of sovereignty accomplished half-a-century before; though Lord Salisbury consistently refused to recognise Portuguese authority in the Shirë district, based upon isolated treaties and expeditions of ancient date. The Siamese expedition of forty years back would be of great importance in establishing the claims of Siam to Quedah as against other nations. Has it the same weight as against Quedah itself? Apparently it has: for other nations can acquire in Quedah no more rights than Quedah has to give—and if they are barred, claiming through Quedah, Quedah seems to be barred herself. But was the weight of that expedition decisive? It is here that the difficulty comes, and it may well be thought that a military attack, repelled by continued fighting and eventually leading to the retirement of the invaders, is not a very successful demonstration of the existence of suzerain rights. And the Siamese suzerainty, if it exists, cannot go beyond the nominal form which is all that it has hitherto taken. It cannot, when transferred to Britain, change its character, and justify active interference in the internal affairs of the country.

The Declaration of London.

Mr. Leverton Harris has been recurring in Parliament to the ambiguities of this document, which Sir E. Grey has stated in Parliament will not now be ratified before June 10, 1910. On June 21, Mr. Harris inquired whether contraband, such as food, (1) consigned to British ports, being bases of warlike supply, (2) consigned to ports being bases of warlike supply, but in actual transit to neutral ports, would be liable to capture. The answer to the first part of the question was naturally in the affirmative; to the second it was ambiguous. It was stated that no definition of the term "base of supply" had been agreed on. Since it might well include every important harbour in such a country as England, it apparently means very little, and we may take it that all articles *ancipitis usus* can henceforward be cut off from the British Islands without any blockade. It has been stated that the effect of Article 35 of the Declaration is to make vessels absolutely free which are bound with "occasional contraband" for a neutral port. But all that the Article says is that such articles shall be "presumed" innocent: and as it goes on to say that "All the presumptions contained in this Article may be rebutted," it is not a very valuable protection.

Treaty by declaration.

An ingenious method of concluding an international agreement with the United States of North America, without consulting the Senate, was hit upon by Mr. Root and Lord Takahira a few months ago. Writers on the law of Contract have been accustomed, since contracts were first studied, to lay stress on the "union of wills" and the fact of psychological agreement. If they are right, simultaneous identic declarations are very hard to distinguish from contracts, and simultaneous international declarations

are equally hard to distinguish from treaties. This Japonico-American case is therefore a striking demonstration of the inadequacy of the "*consensus in idem*" theory. There is a perfect *consensus in idem*. And it is at any rate plausibly represented that there is no contract.

Something more than the expressed identity of sentiment is necessary to make a contract. The fact that the one party has led the other to rely on a particular course of conduct is, as Professor Holland has taught the younger generation of English lawyers, the decisive feature. In this aspect, the interchange of identic declarations by the ministers of the United States and of Japan presents all the essentials of a treaty. Either it is nugatory, or it is contractual. It cannot be nugatory. No minister of the United States or of Japan could possibly dismiss it from consideration as invalid. It must be in the nature of an agreement. And if so, it would seem to be obnoxious to the provisions of the United States Constitution which prevent treaties from being made without the concurrence of the Senate. It is indeed somewhat difficult to see what the precise force of that provision is, or how it can have any operation outside the limits of the United States. It can, of course, prevent a treaty from having the force of law within those limits. It can make it an offence in a minister to conclude a treaty. But it cannot bind other nations, or make it incumbent upon them to learn American Constitutional law. Mr. Hamilton, K.C., suggested in a speech at the Conference of the International Law Association, held at Portland in 1907, that foreign nations would do well to remember, when concluding treaties with the North American Union, that difficulty might arise in enforcing their provisions, owing to the constitutional weakness of the Union Government *vis-à-vis* the separate States. This is a useful practical warning. But it does not in the least diminish the jural responsibility of the Union

for the execution of such treaties as it enters into, whether it ought constitutionally to have entered into them or not. Similarly, if the accredited agent of the Union Government makes solemn declaration in his official capacity, on the faith of which other nations are evidently intended to rely, it is difficult to see that the absence of senatorial consent is anything but a matter of purely domestic concern. The States-General were incapable of making treaties without the consent of the provinces of Holland. But, as a matter of fact, they did make them, and, the provinces having no international status, their veto became a fiction. American formal treaties are made subject to the Senate's ratification: this informal treaty is none the less a binding engagement because no such condition is attached to it.

Workmen's Compensation.

An interesting case, *Tomalin* v. *S. Pearson & Sons, Ltd.*, has decided that the Workmen's Compensation Acts are limited in their scope to accidents taking place in the United Kingdom. A firm of contractors, who had employed a man at Dover, offered him an engagement at Malta, to work on a breakwater. In the course of this employment he was killed, and his widow claimed compensation from the County Court Judge of Kent. It was clearly a hopeless contention, and it received rather more respect than it deserved in the Court of Appeal. The argument apparently proceeded on a sweeping extension of the fashionable principle that the intention of the parties is all-important in all questions of contract. It was argued that the contract made in England between domiciled English people must have been intended by them to carry all the incidents of the ordinary English law. The Court, while not denying that such might be the case with regard to a question of the interpretation of the contract, held that the widow's claim rested on a right independent of

contract, and that, therefore, the argument drawn from the intention of the parties did not apply. The case accordingly resolved itself into the determination of the proper law for the determination of the existence of an obligation arising *ex lege*. In the particular circumstances, it was held that the English statute was improperly invoked, not being expressed to extend to accidents occurring abroad. It would have been interesting to know what view would have been taken if the workman had survived to claim compensation for himself: it could hardly have been different, on principle.

Foreign Service in Admiralty Cases.

A curious case is that of the *Hagen*, decided some time ago by the Court of Appeal. It arose out of a double collision in the Elbe. The railway packet *City of Bradford* collided with the *Hartley*, both being British steamers. Then the *Hartley* fell across the bows of the *Hagen*, belonging to the German-Australian Steamship Company. The *Hartley's* owners promptly sued the *City of Bradford's* in England *in rem*, and arrested the *res*. A cross-action was commenced, *in personam*, a day or two later, by the Great Central Railway Company, the *City of Bradford's* owners, against the owners of both the other ships. The *Hartley's* owners appeared to this, and applied to consolidate it with their own action *in rem*. The *Hagen's* owners were served with notice of it, out of the jurisdiction, and moved to set that service aside. The order giving leave for foreign service was supported on the ground that the German owners were "necessary" or "proper" parties to the action. The case was, however, complicated by the fact that simultaneous proceedings were going on at Hamburg. The Great Central Railway had obtained and given security as between themselves and the German company, to avoid mutual arrests. The German company

had commenced an action, *in rem* or *in personam*, against the *Hartley's* owners. On these grounds, the order for foreign service was discharged. It was not a proper case for the exercise of the discretion to allow it.

"I confess it does strike me," says Lord Alverstone, C.J., "that, although that was a perfectly legitimate step to take [*i.e.*, the commencement of an action *in personam* against both ships], the real object, and the only object, of the proceedings *in personam* was to drag the German company here." It was really in breach of the understanding on which mutual bail, or its equivalent, was given by the *City of Bradford* and the *Hagen* in Germany, to commence proceedings against the *Hagen in personam* here; even though jointly with another defendant. In the *Mannheim*, it is true that Lord Gorell, when President of the Admiralty Division, had held that bail given abroad would not protect a ship from an action *in rem* here. But, even if that case can be supported—and Williams and Bruce strongly suggest that it cannot—it evidently has no application when the *res* is not in England. "Where you have got," says the Chief Justice, "competent parties taking steps to enforce their rights in a foreign civilized country—proceedings taken practically in accordance with understandings—we ought not to allow notice of this (to a certain extent) colourable and unnecessary writ to be issued, not for the purpose of enforcing the rights of the *City of Bradford* against the *Hartley*, but in order to enable these defendants to be brought before the Court. It is not disputed that if the *Hagen* were the only ship alleged to be to blame, the plaintiffs could not bring the defendants here; and the Court, having regard to the place of collision and the other circumstances of the case, ought to be slow to force the German defendant here." Courts of Admiralty used to recognise each other's international jurisdiction all over the civilized world, and the Lord Chief Justice's ruling is in accordance with the best traditions of the English maritime tribunal.

Farwell, L.J., adopted the *dictum* of Pearson, J., in *Soc. Gle. de Paris* v. *Dreyfus* (1885, 29 C. D. 239), that "most distinctly, this Court ought to be exceedingly careful before it allows a writ so be served out of the jurisdiction." He added, that Williams, L.J., and himself had on various recent occasions concurred in applying this principle and the further canons (1) that in case any doubt occurred it ought to be resolved in favour of the declinature of jurisdiction—and (2) that failure to make a full and fair disclosure on the *ex parte* application for leave would justify the Court in discharging the order. Kennedy, L.J., concurred in the decision. The agreement to interchange security was, "practically," the commencement of an action in Germany: so that there was *lis alibi pendens* from thenceforward, provided that Court proceedings were in fact commenced without undue delay. In point of fact, such proceedings were not commenced for nine weeks from the arrangements being made: *i. e., after* service of the English writ:—but this was considered a sufficiently prompt proceeding.

TH. B.

IX.—NOTES ON RECENT CASES (ENGLISH).

SOME appeals are inexplicable. *Edwards* v. *Edwards* (L. R. [1909], A. C. 275) is one of these. There a testator by his will left his realty to his two sons, as tenants in common in fee simple. Then by a codicil he imposed or tried to impose on the devisees an obligation to pay a penny per ton and an eighth of any dead rent henceforth payable in respect of the coal underneath the land "when the same is worked" to each of his daughters for life and afterwards "among the children of each and their heirs." If ever there was a limitation clearly contrary to the rule against perpetuities, surely this was it. So thought the judge of first instance (Kekewich, J.). So thought the Court of

Appeal, which unanimously affirmed his decision. And so thought the law reporter, who considered the case so evident that it was not worth reporting. It was carried, nevertheless, to the House of Lords, which unanimously affirmed the Court of Appeal. So for once in a way the appellants have shown at great expense that the law is not always so "gloriously uncertain."

Another inexplicable appeal is *Low* v. *Guthrie* (L. R. [1909], A. C. 278). That was the case of a father who had been abandoned by his wife and family some forty years before his death, making a will under which the family took nothing and the solicitor drafting it for him took everything on secret trusts, with a residuary gift to himself. The evidence clearly established that the solicitor had acted honestly, and had derived little or no benefit from the residuary gift, and all suggestions of fraud on his part were withdrawn by the appellants. The sole ground alleged for upsetting the will was that, as laid down by Parke, B., in *Barry* v. *Butlin* (2 Moo. P. C. 480), and approved by Lord Cairns in *Fulton* v. *Andrew* (L. R., 7 H. L. 448), the preparation of a will by a party who takes a benefit under it is a matter of suspicion, which should make the Court jealous to see that, in fact, the will represents the intentions of the testator. As long as this remains the law, all that the party drafting the will need prove to sustain the will is, that there was no fraud or undue influence misleading the testator, and here it was admitted there was none. Why, however, this should be the law is one of the mysteries which induce Tony Wellers to declare it "a hass." A legal adviser cannot take a benefit from his client when such client is living and well, unless the latter has independent advice on the matter; but when such client is dying and weak, he may take all the client has without his having independent advice, provided he can show that the client intended, in

fact, what the will says. Surely if the rule was reversed it would be nearer common sense.

In *Ebbern* v. *Fowler* (L. R. [1909], 1 Ch. 578), a woman had gone through the ceremony of marriage with J. K., who had previously been her sister's husband. The woman's mother—who was also the mother of J. K.'s previous wife—settled by deed certain property on her for life and then on her children. In the settlement the woman is described as J. K.'s wife, and at the date of the settlement she was with child by J. K. Yet it was held by Joyce, J. (because he could not over-rule *In re Shaw* (L. R. [1894], 2 Ch. 573), that this child could take nothing under the settlement. Fortunately the Court of Appeal could over-rule *In re Shaw* (*supra*), and very promptly did so. How it came that that decision, which was in absolute defiance of the liberal and intelligent rule laid down by Lord Cairns in *Hill* v. *Croole* (L. R., 6 H. L. 265), was ever acquiesced in is hard to say. But in some cases the failure to appeal is even more inexplicable than the appeal in others. If the settlor was to be allowed to make "her own dictionary," as Lord Cairns said, surely she could not have indicated more clearly whom she meant by her daughter's children than by describing her as the wife of J. K.?

Another decision on a kindred point is in entire agreement with the common-sense view taken by the Court of Appeal. In *In re Eves, Edwards* v. *Burns* (L. R. [1909], 1 Ch. 796), where property was left to the "children" of a woman who at the date of the will had two illegitimate children, and was sixty-eight years of age, Swinfen-Eady, J., held that these two illegitimate children must be meant.

When the terms of an instrument are clear, it is a very good rule that the Court has no alternative but to follow the

obvious meaning, without considering the probability of that being what the parties actually intended, or rather would have intended, had they anticipated the circumstances at the time of making the instrument. But whether Swinfen-Eady, J., in *In re North, Garton* v. *Cumberland* (L. R. [1909], 2 Cr. 625), has not carried that principle too far, may perhaps be doubted. There a gift of £50,000 made by a husband to his wife, was held to be caught by a covenant in her marriage settlement to settle after-acquired property. Such covenants (like other provisions relating to executory trusts) have hitherto been construed perhaps a trifle too liberally, as being primarily intended to protect a wife's property from her husband. It seems strange to interpret them so as to prevent a husband giving his property to his wife.

In *In Re Nicholson, Eade* v. *Nicholson* (L. R. [1909], 2 Ch. 110), Warrington, J., has done something to make clear the way of trustees through the darkness, due to many decisions, on the question of the income payable to the life tenant when securities which might be are not converted. He has there held that, where trustees are empowered to retain securities which otherwise should be converted under the rule in *Howe* v. *Dartmouth* (7 Ves. 137*a*), the trustees should pay the whole income to the life tenant, whether such securities are wasting or not. The decision, which disregards that of Hall, V.C., in *Porter* v. *Baddeley* (L. R., 5 Ch. D. 542), will save trustees many inquiries and more difficult calculations.

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In re Horsnail, Womersley v. *Horsnail* (L. R. [1909], 1 Ch. 631), is also important to trustees. There certain realty (and other estate) was settled by will in undivided third shares on each of the testator's three children for life, with remainder in fee on their children. One of the children

died after the testator, leaving three children, one of whom had assigned his share—a ninth—to a reversionary company. The company desired the realty to be sold, but the life tenants objected, and the trustees exercising a discretion to postpone the sale, given them by the will, refused to sell. Held by Swinfen Eady, J., that though the company was entitled to a ninth share absolutely in possession, the trustees' discretion to postpone the sale still subsisted.

Sir George Jessel was a great Chancery judge though, possibly, the position he assigned himself among Chancery judges ("Hardwicke is first, Cairns is second, and I'm third"), was somewhat too exalted. But unquestionably his hurried mode of deciding subsidiary points and of expressing his decisions, has given later judges considerable trouble. A short time ago it was *Steed* v. *Preece* (L. R., 18 Eq. 192), which was giving trouble (see *Law Magazine*, Feb. 1909, p. 217); now it is *Osborne to Rowlett* (L. R., 13 Ch. D. 774). There he seemed to hold that, in order that the executors of a last surviving trustee should be entitled to exercise a power of sale given by the will, the will need give no indication that anyone except the trustees is to exercise it. Every other judge has held that there must be some such indication—as the power or trust property must be given to the trustees "and their heirs," or, "and their executors, administrators and assigns," etc. And so in spite of *Osborne to Rowlett*—which indeed, like *Steed* v. *Preece*, seems inconsistent with some other decisions of Jessel himself—Parker, J., has in *In re Crunden and Meux's Contract* (L. R. [1909], 1 Ch. 690), expressly held.

J. A. S.

Read v. *Price* (L. R. [1909], 1 K. B. 577; 78 L. J. R. [1909], K. B. 504) somewhat enlarges the power of one joint debtor to continue, by an acknowledgment, the liability

of his fellow joint debtors against the Statutes of Limitations. Under the Common law, as enunciated by Lord Mansfield in *Whitcomb* v. *Whiting* (2 Dougl. 652 and S. L. C., vol. 1, p. 579), "payment by one is payment for all, the one acting virtually as agent for the rest. In the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." Though Lord Tenterden's Act 1828 (9 Geo. 4, c. 14) provided that no joint contractor or his personal representative should lose the benefit of the Statute of Limitations, merely because of a written acknowledgment signed by any other of them, yet this Act applied to simple contract, not to specialty, debts. But in 1833 the Civil Procedure Act, enacted by sects. 3 and 5, that an action on specialty may be brought at any time within 20 years after the cause of action, or after an acknowledgment in writing signed by the party liable, or else after part payment on account of principal or interest. Then, in 1856, the Mercantile Law Amendment Act curtailed this by enacting that no co-debtors, executors or administrators, coming within the terms of sects. 3 and 5 of the Civil Procedure Act, should lose the benefit of the limitation so as to be chargeable by reason only of payment of any principal or interest by any other of their fellow co-debtors or his executors or administrators. So that now the only means by which the liability can be sustained beyond 20 years from the cause of action, is by an acknowledgment of the debt signed by the party to be liable or his agent. In *Read* v. *Price*, as the principal debtor had paid interest on a bond beyond 20 years from its execution, he had confirmed his several liability against his own estate; but he died insolvent. On his death, of course, his joint liability ceased; and so far the surviving co-debtors were not bound. But he had written letters, since destroyed, acknowledging the debt. On the important

question whether secondary evidence of these letters could, notwithstanding the statute, be received, Channell, J., held that it could, in accordance with the rule that oral accounts of their contents had been given by a person who had seen them.

It must be a harrowing duty to have to decide a case against one's own convictions, on the constraint of a judgment of a higher Court with the reasoning of which one does not agree. This was the compelling fate of Channell, J., in *County of Durham Electrical Power Distribution Company* v. *Inland Revenue Commissioners* (L. R. [1909], 1 K. B. 737), who had reluctantly to rule, under *National Telephone Company* v. *Inland Revenue Commissioners* (L. R. [1900], A. C. 1), that a contract for the sale of goods to be paid for by fixed instalments must bear an *ad valorem* stamp.

It is perhaps less agonising to acknowledge and confess that one's own decision in an earlier case is susceptible of amendment, as in *Arlidge* v. *Islington Corporation* (L. R. [1909], 2 K. B. 127), and in *Rex* v. *Ettridge* (L. R. [1909], 2 K. B. 24), in the former of which Lord Alverstone, C.J., said that in *Stiles* v. *Galinski* (L. R. [1904], 1 K. B., pp. 622, 623), " I seem to have gone further than I ought to have gone " ; and in the latter, Darling, J., after stating that in *Rex* v. *Davidson* ([1909], W. N. 52) the Court, as at present constituted, had decided in a certain way, added, with gentle humour, " we propose now to consider the question without reference to the opinion we formerly expressed."

To a man who from poverty is unable to discharge a debt, the penalty of a distress on his goods is a serious aggravation of his financial burden, and the decision in *Willey* v. *Hucks* (L. R. [1909], 1 K. B. 760) may in some future cases lighten it. In sect. 11, sub-sect. 2 of the Bankruptcy Act,

1890, "an execution in respect of a judgment for a sum exceeding £20" means that where the debt and poundage exceed that sum, and not the debt and poundage plus the fees for possession, appraisement, and sale. In any case the charges are very heavy. In this one they would have amounted to nearly two-fifths of the original debt.

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In *Griffith* v. *Fleming and others* (L. R. [1909], 1 K. B. 805), the Court of Appeal have established the new doctrine that a husband has an insurable interest, independent of a pecuniary one, in the life of his wife. The case arose on the repudiation, on the strength of 14 Geo. 3, c. 48, on the part of an insurance company of a policy issued by them, in which a husband and wife each insured his or her life for the benefit of the survivor. And the decision is founded on the grounds, 1st, that the insurers could not avoid their liability by setting up a policy which they themselves had prepared in a form not warranted by the proposals, but adopted apparently to secure themselves the continuance of the aggregate premiums; 2nd, that even on that form the policy could be supported under sect. 11 of the Married Women's Property Act, as it was expressed to be for the benefit of the survivor. But the main general reason, and the most interesting is, that, corresponding to the law declared in *Reed* v. *Royal Assurance Co.* (2 Peake's *Nisi Prius Reports* [1795], 70), that "a wife making an insurance on her husband's life need not prove that she was interested therein," a presumption ought now to be adopted that a husband has an insurable interest on the life of his wife. There appears to be no English authority for this. But Farwell and Kennedy, LL.J., drew attention to a note in Bullen and Leake, 2nd edition, p. 161. This was published so long ago as 1863, and the words are "a wife may insure her husband's life, and a husband his wife's. It is sufficient that there is an interest in the life of the person

insured at the time of effecting the insurance . . . The value of the interest at the date of the policy may be recovered on the death, but no more."

When Quarter Sessions, in the case of a prisoner convicted of larceny, discharged him on his entering into recognizances to be of good behaviour, they were within the powers given them by the Probation of Offenders Act 1907; but they went beyond the powers in ordering that there should be a condition that the offender should abstain from intoxicating liquors for a period. And the Court of Criminal Appeal, in *Rex* v. *Davies* (L. R. [1909], 1 K. B. 892), have quashed his conviction for breaking the condition before his period of abstinence was fulfilled, as a condition of sobriety can only be imposed when the offence of which the prisoner is convicted is committed under the influence of drink. Here he broke the law while in possession of his unclouded senses, and it is surprising that Quarter Sessions should have made the double mistake.

The "business meaning" of the word pirate seems to be, according to *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Company* (L. R. [1909], 1 K. B. 785), a person who is plundering indiscriminately, for his own ends, beyond the jurisdiction of a State: *hostis humani generis.* The definition in the Oxford English Dictionary is "one who robs and plunders on the sea, navigable rivers, &c., or who cruises about for the purpose; a sea-robber." Probably in all cases the enemy of mankind must start from the high seas. The Act upon which the case was founded was committed not on a river "where it ran into the sea but on a branch river running into another branch river." As the case may be further reported, the other points need not at present be noted.

The Court in *Davies* v. *Harrison* (L. R. [1909], 2 K. B. 104) could hardly have decided otherwise than that a six-days' licensee under the Licensing Act of 1872 is not compelled to close his premises entirely on Good Fridays and on such Christmas Days as fall on week days simply because sect. 3 of the Act of 1874 says that public-houses are to be open on those days only during the hours fixed for Sundays. But the point seems to have been a debatable one in the trade for many years, and a leading text-book on licensing holds that these two days are to be closed days to the licensee under the Act of 1872. Yet such a view can be reduced to an absurdity on the supposition that Parliament should enact that no inn should be open on any day except as on Sundays, for under such a condition a six-days' licensee would have to keep his doors locked all the year through, and so much of the Act of 1872 as authorises these restricted licences would fall into decay.

It is probably safe to say that it is now a firm rule of law that from an agreement in restraint of trade containing terms which are reasonable and others which are not, the latter may be expunged, and that then, the remaining terms being all reasonable ones, the agreement will be enforced. This at any rate is the rule in agreements between persons *sui juris*. But where one of the parties is an infant, the cases are not so decisive. In *Bromley* v. *Smith* (L. R. [1909], 2 K. B. 235), the ruling of Channell, J., seems to be that it is for the benefit of an infant that he should obtain employment, and if he can get employment only by signing an agreement containing terms of wide restraint on the future exercise of his knowledge and abilities, the agreement is, on the whole, for his benefit, and will be valid and enforceable when any unreasonable terms in it are removed.

T. J. B.

IRISH CASES.

A deposit of title deeds by way of security operates, by what has been called "an old equity in the teeth of the Statute of Frauds," as an agreement to execute a legal mortgage of the premises comprised in those deeds, and therefore, in the view of Equity, is equivalent to an actual mortgage. The extent of the premises included under the agreement is a question of fact—a question of evidence as to what was the real agreement of the parties. These familiar principles are illustrated by *Simmons* v. *Montague* ([1909], 2 L. R. 87). A hotel owner deposited with a bank, by way of security, his title deeds and a map of the hotel premises: there was no accompanying written memorandum. A transferee from the Bank brought an action to raise the amount of the mortgage, and the Court ordered a sale. When the title came to be investigated, it appeared that part of the premises shown in the map was not comprised in the deeds, the mortgagor having only a possessory title thereto. The Court held that the effect of the inclusion of the map along with the title deeds was to show an intention, by the mortgagor, to charge all his interest in the hotel premises, including that part to which he had only a possessory title; and as the purchaser waived his right to object to the nature of the title in that part, a conveyance of the entire premises to him was directed. "The case is not a case of declaration that the mere deposit of a map was a good mortgage, by way of equitable deposit, of the premises shown upon it; it is a finding that, taking the documents as a whole, there was an agreement between the parties evidenced by the documents to execute a mortgage of the hotel premises, including the premises coloured yellow on the map."

The rule that a will speaks from the testator's death may sometimes operate in favour of a legatee, and sometimes

against him. It had the latter effect in *Mack* v. *Quirey* ([1909], 1 Ir. R. 124). A testatrix gave to her executors "ten old Belfast Bank shares," on trust, to pay the income dividends and profits thereof to a son of her cousin for his life, and subject thereto, on trust for any widow he might leave and his children, share and share alike. At the date of the will these shares were £100 shares, worth £129 each. Before the death of the testatrix, the Company resolved that the £100 shares should be sub-divided into ten shares of £10 each, which were to be called "old Belfast Bank shares." These shares at the time of her death were worth £12 : 13s. each. On a summons to determine the value of the shares which passed under the gift, it was held that the legacy was general, that there was no contrary intention to exclude the operation of sect. 24 of the Wills Act, and that the gift only carried ten of the sub-divided shares, or their value ascertained as at the date of the death. Once the legacy was held a general legacy, the rest of the decision followed as a matter of course; as the testatrix had only ten old shares at the date of her will, and kept the certificates for these till her death, it is at least arguable that the legacy was really specific. In that case, however, a question of ademption would arise.

A wit in the time of Charles II said that "laws are not like women, the worse for being old"; but in *Preston* v. *Greene* ([1909], 1 Ir. R. 172), very considerable discussion took place as to whether the Court was bound to follow a decision exactly in point, given by Lord Chancellor King in the year 1726. It is fair to add, however, that the case in question (*Holt* v. *Frederick*, 2 P. W. 356) does seem rather contrary to natural equity, and has been adversely commented upon in Jarman (Conveyancing, 3rd ed., Vol. II, p. 412). The point is a simple one. A widowed mother made an advancement to her child; she then

re-married, had other children, and died intestate. Was the child who had been advanced entitled to take its share under the Statute of Distributions without bringing the amount of advance into hotchpot? *Holt* v. *Frederick* said yes; and the Master of the Rolls in the present case, though hinting pretty clearly that his own opinion would have been the other way, considered that he was not at liberty to set up that opinion against the decision.

Attorney-General v. *Longford* ([1909], 2 Ir. R. 436) is a revenue case on which the Lord Chief Baron considered no previous authority to be in point. Portions of undeveloped land adaptable as sites for villa residences were let in lots on leases for 99 years, each lease reserving a fixed sum as rent, and containing a covenant by the lessee to expend a sum in building on the demised premises within five years, with a proviso that on breach of the covenant the lease should become void, and that, in such case, the lessee should hold the demised premises for 21 years from the date of the demise at the fixed rent. The covenants were performed, and the lands were held by the lessees for the full 99 years. The Attorney-General then claimed a declaration that on the expiration of the leases the successor of the lessee was bound to deliver a succession duty account under the Succession Duty Act, 1851. This liability depended upon whether the leases in question came within the proviso in sect. 20 of that Act, exempting leases "purporting at the date thereof to be leases at a rack-rent." Palles, C.B., considered that for a lease to be within this section it must appear that the rent, and nothing more than the rent, is to be given for the tenement; but that here, in addition to the rent, the lessee gave the agreement to expend a sum in building, which covenant was in itself a valuable consideration. He therefore held that the Crown was entitled to judgment.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Cases on the Conflict of Laws. By ERNEST G. LORENZEN, Ph.B., LL.B. (Cornell), J.U.D. (Göttingen). St. Paul: West Publishing Company. 1909.

The above work is one of thirty volumes, which constitute the "American Casebook Series," which is intended for use in the law schools of the United States. The drawback to a book of this nature is that the subject is divided into several headings, under which headings are grouped cases which, in the opinion of the learned Author, bear directly upon each particular heading. Mr. Lorenzen holds the position of Professor of Law in the George Washington University Law School, and so is presumably conversant with his subject, still for all that the selection must necessarily be of an arbitrary nature. To illustrate what we mean, let us take Chapter V, which deals with "Domicile." This chapter is divided into three sections, "General," "Domicile of Married Women," and "Domicile of Minors." Under Section I are given various leading cases, such as *Winans* v. *Attorney-General*, etc., but as to what particular principle of law these cases illustrate, is left to the imagination of the student after perusing them. It is well known that the case above mentioned illustrates several, but why the report of that particular case is inserted by the learned author in the text, is a question which he does not attempt to answer. Certainly leading cases are cited, but the book is more conspicuous by reason of its omissions rather than its commissions. We notice that the general Editor of the series tilts against the delivering of lectures to students by law professors, and claims that the system is doomed. We conclude that his remarks are intended to be confined to the United States, for, without laying ourselves open to the charge of insular prejudice, it does seem that that system is preferable to the one which hurls a mass of undigested information at the head of the unfortunate student, and expects him to use his own precautions against a severe attack of intellectual indigestion. It would appear as if this work would be of one use, and that is to act as a collection in one volume of cases reported in many reports not easily procurable. We would,

however, commend to the serious consideration of Professor Lorenzen that in future editions he should supply some key, however slight, to the reasons for which he sets out the cases contained in this book. We note that in the Appendix are given the Conventions of the Hague relating to Conflict of Laws in the years 1902 and 1905.

Leet Jurisdiction in England. By F. J. C. HEARNSHAW, M.A., LL.M. Southampton: Cox & Sharland. 1908.

How many of the public, not to mention lawyers, know of the existence of the "Court Leet of Southampton," together with some forty-four others scattered throughout the length and breadth of England and Wales? This Court, held the third Tuesday after Easter, sits at the present day in the Audit House of the Municipal Buildings at Southampton, but was formerly convened at Cutthorn, open to the heavens, under the shade of beautiful trees. In the Introduction Professor Hearnshaw, in language mediæval, describes this quaint link existing between ancient and modern times. In curious language, after the jurors have been sworn, the steward reads a formidable list of the duties they have to perform. Such questions as maintaining a pair of stocks, poaching, using of false weights by tradesmen, and the existence of nuisances come up for discussion. Needless to say, no discussion as a rule takes place, and the faithful jurors pass into the Mayor's parlour to be regaled by the sheriff with a champagne lunch after their arduous labours. The work was originally intended merely to be a historical review of the Southampton Court Leet. Subsequent investigation convinced Professor Hearnshaw that it was necessary to traverse the whole system as it existed and exists throughout England and Wales. The learned Author points out how in certain particulars he differs from the late Professor Maitland, whose death deprived the world of one of the most brilliant explorers in the realms of Mediæval law and legal history. When such great authorities differ, who can decide which is right? This book will be of interest to the lawyer who possesses an antiquarian turn of mind, and if of no every day utility, it nevertheless serves as a monument of the labours of those who wish to perpetuate the history of our ancient legal institutions. To men such as the learned Author, Professor Maitland, Dr. Vinogradoff, and others, historians and lawyers owe a debt of gratitude for their unsparing devotion to this form of historical research.

The Time Limit on Actions. By J. M. LIGHTWOOD, M.A. London: Butterworth & Co. 1909.

The above is a Treatise on the Statute of Limitations, and also on the equitable doctrine of Laches. The writing of this book was suggested to the learned Author by reason of a chapter on the Real Property Limitation Acts, 1833 and 1874, which formed a part of his *Possession of Land*, published in 1894. The text is divided into nine chapters, dealing with (A) Land and rent-charges; (B) Money charged on land, judgments and legacies; (C) Arrears of dower rent and interest; (D) Actions of contract and Tort; (E) Claims in Equity; (F) Extension of period of Limitation; (G) Stopping the Statute; (H) Public Authorities; (I) Criminal and Crown Proceedings and Proceedings before Magistrates. From this enumeration it will be apparent that the learned Author has dealt with his subject in a wide and comprehensive manner. The quality of the work has reached a high and efficient standard. The method of arrangement leaves little if anything to be desired, especially his manner of dealing with the *Nullum Tempus* Acts. In treating of the subject of dispossession, the effect of the authorities has been elucidated by a series of rules of the Author's own manufacture, by which means both the theoretical and practical importance of this branch of the law has been thrown into strong relief. Recent decisions, such as *Perry* v. *Clissold* (L. R. [1907], A. C. 73), *In re Nisbet and Pott's Contract* (L. R. [1906], 1 Ch. 386), and *In re Lacey* (L. R. [1907], 1 Ch. 330), have given the Author great assistance in pursuing this course. Many other subjects of great practical importance have been dealt with in a fresh, crisp and illuminating style. In fact one is bound to say that the learned Author's style of writing is all his own, and is refreshing in its novelty. Undoubtedly this work will meet with a large measure of success, merited by the ability with which the subjects are disposed of.

A Digest of the Law relating to Private Trusts and Trustees. By W. G. HART, LL.D. London: The "Law Notes" Publishing Offices. 1909.

Mr. Hart is a great believer in codifying the law of Trusts in the same way as the law relating to Bills of Exchange, Partnership, Sales of Goods, and Marine Insurance has been codified. Not content with merely holding this belief, Mr. Hart drafted a bill which was introduced in the House of Commons by Mr. Athelstan

Rendall in 1907. This Bill was referred to a Select Committee comprising such eminent authorities as Mr. Phipson Beale, K.C., Mr. Cave, K.C., and Mr. Stewart Smith, K.C. It enjoyed many vicissitudes, including reports of the Judges of the Chancery Division and the Law Society made upon its provisions. It is apparently now in a state of "suspended animation," meanwhile the Author of it has been tempted to publish the notes on which the clauses of the bill were based. The draft code appears to be very comprehensive, and the notes are excellent, so that if Mr. Hart's Bill survives all its adventures and becomes enshrined in the Statute Book, this treatise, by reason of its authorship, will be of considerable value; in the meantime it would be premature to offer an opinion.

The Law relating to Custom and the Usages of Trade. By R. W. ASKE, LL.D. London: Stevens & Sons. 1909.

It must have given Mr. Aske considerable trouble to choose a suitable title for his work, and it cannot be said that the one chosen is altogether satisfactory. Parts of this book are very apt, but others again are somewhat confusing and the arrangement open to question. We are at a loss to understand the utility of dividing the text into five Parts and nine Appendices, when the matter treated in the Appendices is every bit as important as that treated of in the body of the book. The first Part deals with General Customs, which include the Custom of the Realm and the Custom of Merchants. In Part II Particular Customs find place, and Part III deals with Customs as to the construction of Contracts. Part IV is headed Customs rebutting reputed Ownership in Bankruptcy, and Part V Usage independent of Contract. It may be our fault, but we do not quite follow the distinction drawn by the learned Author on page 199 *et seq.*, between Usage and Custom, but perhaps in trying to unravel the confusion of terminology spoken of on page 13, he has made "confusion worse confounded." Apart from these criticisms this treatise undoubtedly possesses considerable merit, and we hope that its reception will be such as will encourage the Author to persevere in the production of legal literature.

A History of English Law. Vols. II and III. By W. S. HOLDSWORTH, D.C.L. London: Methuen & Co. 1909.

A complete history of English law has long been wanted, and something like six years ago Mr. Holdsworth showed in his first volume

that there was a prospect of our desires in that respect being gratified. The large amount of work to be done, and the limited time the Author has had to give to it, have caused considerable delay in the continuation of the work. Instead of the one more volume originally promised, we now have two, and the work is by no means completed. The Author, while acknowledging this, does not say whether it is his intention to proceed with it. We sincerely trust he does, as the present volumes hardly get beyond the mediæval period on most subjects. The Author has had considerable difficulty in adjusting "the claims of a chronological narrative with the necessity of giving a connected account of various parts of legal doctrine." He has met the difficulty by adopting the chronological order in dealing with general history, and "neglecting" it when treating specially legal doctrine. Of recent years, great contributions have been made to legal history, both by the valuable writings of Professors Maitland, Pollock, Vinogradoff, Kenny, and others, and by the publication and editing of numerous records by the Selden Society and other bodies. All these contributions to knowledge Mr. Holdsworth has carefully examined and weighed, and, both in his Preface and at the conclusion of the third volume, he has made a graceful and eloquent acknowledgment of his indebtedness to Pollock and Maitland's *History of English Law*, and expressed the universal regret at the loss of Professor Maitland. The labour of the present work must have been enormous, as the references show. It is impossible for us to examine it here in detail, but we propose to give, shortly, an account of the contents of these two volumes. The second volume, Book I., begins with an account of what the Author calls "Anglo-Saxon Antiquities." The first part treats of the Sources and General Development, and the second part of the Rules of Law. It is worth noticing in the first part that Mr. Holdsworth disclaims the idea of there being any appreciable mixture of either Celtic or Roman elements in Anglo-Saxon law, and follows the latest opinions on this much-controverted point that the Law was mainly Teutonic. The second part deals with (1) The Ranks of the People—that is, the manner in which the Anglo-Saxons were grouped when they first came to England, and the subsequent modifications; (2) Criminal law and its gradual growth, from being only the affair of the injured party to the interest of the State being involved; (3) The Law of Property—we find here much interesting information as to the Land law and

the systems of cultivation; (4) Family law; and (5) Procedure. Book II—The Mediæval Common law includes the whole of the rest of these two volumes. It is divided into two Parts like Book I. Part I is entitled "Sources and General Development," and has four chapters. Chapter I covers the period from the Conquest to Magna Charta—"the beginnings of the Common law." It describes in a very interesting manner the European and English influences which affected the growth of the Common law, and gives information as to such subjects as the *Domesday Book*, the Pipe and other Rolls, Glanvil and Magna Charta. The second chapter traces the progress of the Common law during the reign of Henry III, and treats in considerable detail of the works and influence of Bracton. The third chapter deals with that important period of legal history, the reign of Edward I, and points out how the rise of Parliament and the growth of the legal profession shaped the development of the Common law. (2) What the principles of the Common law were. It is interesting to note how the procedure by way of appeal in criminal cases was being attacked by the indictment on one side and by the action of trespass on the other. This latter both led to the creation of misdemeanours and became "the fertile mother of actions." Although the procedure of appeals then showed marked signs of decay, yet appeal of murder was not finally abolished till 1819. The fourth and last chapter describes "the working and development of the Common law" during the fourteenth and fifteeenth centuries, and it represents a very "curious combination of legal development with political retrogression." The first subject is that of Parliamentary Records and Statutes. In noticing how much a man's life in those days was regulated by statute, and how archery was compulsory, Mr. Holdsworth makes the following observation which we should like to call attention to:—"Here, too, some few of us are perhaps nearer to the mediæval point of view than our ancestors of the last century; for there are some who dream of a state of society in which a portion of the leisure of the citizen shall be devoted to exercises necessary to make him, if need be, an efficient protector of his State." The latter part of the chapter should be of especial interest to lawyers, as it relates to the rise of the legal profession, the *Year Books*, and the lawyers. There are interesting accounts of Fortescue and Littleton. The third volume contains Part II of Book II—Rules of Law—and almost half of it is taken up by an account of the complicated system of Mediæval

Land law. It contains a full description of those Real Actions which did so much to settle the leading divisions of our present law of property. The different tenures and their incidents are set out, and it is traced in an interesting manner how the tenures which were once of a social and political importance became at last only incidents of private ownership. There is also an important chapter showing the relationship and development and separation of Crime and Tort. Space will not permit us to continue our very scanty and imperfect reference to a few of the principal subjects discussed in this learned work, but we hope we have said enough to induce our readers to consult it for themselves.

Ruling Cases. Vol. XXVII. (First supplementary volume). By R. CAMPBELL, M.A., with American notes by J. T. KEEN. London: Stevens & Sons. 1908.

Mr. Campbell's valuable collection of Ruling Cases was concluded in 1902, and the present supplementary volume contains a considerable number of additional notes, both on English and American law, to many of the cases. It also contains some summaries, including a Summary of the American Law on Bailments; a Summary of the American Law on Carriers; a Summary of the English and American Law on Defamation and the American Law on Interference with Contract. A small number of new Ruling Cases have been added, but some of them are very important, as they include *Quin* v. *Leathem; Colls* v. *Home and Colonial Stores; Walter* v. *Lane*, and *Edinburgh Street Tramways Co.* v. *London County Council*, and *Taff Vale Railway* v. *Amalgamated Society of Railway Servants.* It is rather curious that there seems to be no reference to the Trades Dispute Act 1907 in connection with this last case.

Damages in Maritime Collisions. By E. S. ROSCOE. London: Butterworth & Co. 1909.

Mr. Roscoe thinks the time has come when the law relating to Damages caused by collision at sea should be stated "systematically and at length." He accordingly proceeds to do so, not at very great length, but fully and clearly. A valuable addition to the account of the English law is M. Leopold Dor's study of the Law of France and Dr. Schroeder's and Mr. John A. Spen's contribution on the German and Scotch Law on the same subject. An addition

of considerable use to the Admiralty practitioner will be the Unreported Cases and Registrar's Reports in the third part. The reasonableness of the Admiralty Rule as to damages when both ships are in fault is considered with some detail, and it is pointed out that though it cannot be justified in theory, yet it is one of extension and limitation; and he is of opinion that the practice had no particular origin, but "gradually crystallised into a rule towards the beginning of the eighteenth century by reason of the fact that it appeared to be one which was equitable and just."

The Digest of Justinian. Vol. II. By CHARLES HENRY MONRO, M.A. Cambridge: The University Press. 1909.

The first volume of this translation appeared in 1904. Between then and now the translator has died, and his lamented death has made an appreciable gap in the modest phalanx of students of Roman law in England. The work was at the death of the author in so forward a state that in the capable hands of Mr. W. W. Buckland the editing and revising has not been a very onerous matter. This volume contains Books VII—XV. It is not stated whether a completion of the Digest is to be expected. The translation, as was stated in the *Law Magazine and Review* in a notice of the previous volume in 1904, is as accurate as is possible, there being perhaps a tendency to translate untranslateable words, such as the rendering of *leges regiae* by "royal statutes," and of *quaestiones* by "questions."

The English Reports, Vols. LXXII to XCV. King's Bench Division, 1—24. Edited by M. A. ROBERTSON and S. ELLIS. Edinburgh: William Green & Sons. London: Stevens & Sons.

Since we last reviewed the progress of this monumental work, a good beginning has been made by the Editors with the Common law reports. The most miscellaneous of the volumes are LXXX, in which are found collected the reports of Yelverton, Hobart, Davis, Ley and Calthrop, and the first two volumes of Bulstrode: and LXXXII, comprising W. Jones, Latch, March (N.C.), Style, Aleyn and Siderfin. On the other hand, the Modern Reports cover two volumes, LXXXVII and LXXXVIII. Bellewes' compendium of various Norman-French abridgements of the time of Richard II commences the reprint. Then a long leap takes us out of mediæval times, and under the guidance of Croke, we explore Keilway's notes with references—*Jamais uncore imprimés*—of cases *temp.* Henry VII

and VIII, with a few of Edward le Tierce. And so to the "cases collect and report *per* Sir Fra. Moore, Chevalier, Serjeant del Ley," where English begins to creep in, and which end with "Le case del Union, del Realm D'Ecosse ove Angleterre"—a cause of some magnitude.

Calthrop's reports concern the customs of the City of London (he was Recorder). They contain the Articles of the Wardmote inquest and other regulations in the nature of bye-laws. Ley's are of the Courts of Wards and Liveries (he became Earl of Marlborough). Davis' cases are early Irish State trials. Barnes' consist of practice cases; he was a secondary, as Gouldsborough was a protonotary.

In Styles' Reports (24 Car. I), the Court is seen terribly puzzled by a faulty declaration in trover. The plaintiff wanted damages for conversion *de duobus castoribus*—Anglicè hats, whereas "*castor* is not a proper word for a hat." He had also claimed *de uno servitio argenteo,* Anglicè one silver salt, whereas the proper word was *salinarium:* and *de duobus catenis,* Angl. two silver dishes, "which is no word for a dish, much less a silver dish." "Let the judgment here be stayed," said Roll, J., "for we will advise." In Skinner's Reports (9 Gul. III) occurs an interesting decision that the Inner Temple is not a sanctuary. The argument to the contrary (in *Brown and Borlace*) was based on the privileges of the Order of the Templars "which had the most ample privileges of any knights in Europe." If, however, the Temple was not within the City, it certainly was within the County of London, said Holt, C.J. And though a due regard was to be paid to the Inns of Court and to the members of them in respect of arrest and execution, no such privilege could be extended to strangers.

The industry and devotion of the Serjeants as reporters of the law they served is noticeable. Salkeld was a serjeant; so was Barnardiston; so were Carthew, Rolle, Benloe, J. Croke (ed. Keilway), Moore, and Wilson.

There is perhaps no better storehouse of information on manners and customs than old Law Reports. The personal equation is eliminated; the writer is not aiming at being graphic; the facts are accurate; the events relate to no special stratum of society.

Every case reported in this reprint is reproduced in full, *verbatim et literatim.* Everything redundant, such as prefaces, is omitted. Subsequent cases are carefully noted. In short, the publication keeps up its renown as a perfect library of Case law; no higher compliment is needed.

Second Edition. *A Digest of Equity.* By J. ANDREW STRAHAN, M.A., LL.B., and G. H. B. KENRICK, LL.D. London: Butterworth & Co. 1909.

It would be hard to find two lawyers better qualified to write a treatise of this nature than Messrs. Strahan and Kenrick. A work primarily intended for students, the wide experience of each as examiners, the first in Equity and the second in Common law, peculiarly qualifies them for knowing what difficulties beset the beginner who wishes to pass an examination. In the present edition, as before, Mr. Strahan is responsible for Books I, II, and section 6 of Book III, while Mr. Kenrick has undertaken the first five sections of Book III. The work has been very largely recast and three new Articles have been added, thus bringing it entirely up to date. The first Book deals with the "Jurisdiction of Chancery." Here we have set out the history and evolution of the principles which constitute Equity. Book II takes us through the whole gamut of "Equitable Rights," which again are divided: "Equities to protect confidences," "Equities to promote fair dealing," and "Equities to prevent oppression." This wide range of subjects is treated of in a scholarly and erudite fashion, and in simple form easily understandable by the student. "Equitable Remedies" fills Book III, and here such important subjects as "Specific Performance," "Injunctions," and "Administration of Assets," find their place. In each case the Article enunciates in plain, simple form a principle of law, which in its turn is annotated, and the foundations of important decisions thereon elucidated. The Index is concise, and presents an excellent key to the text; full and complete Tables of Statutes and Cases are also supplied. We feel satisfied that this book, covering as it does a wide field of research, may be safely recommended to the student of Equity who has not yet reached the stage of being able to grasp more than fundamental principles which, when grasped, will equip him for a more profound study of the subject.

Second Edition. *Precedents of Conditions of Sale.* By F. E. FARRER and T. P. LAW. London: Stevens & Sons. 1909.

This is a treatise of conspicuous ability, both as regards the matter and method of arrangement. The text is simple and devoid of ambiguous technicality of language, making it a work useful alike to

lawyer, student and layman. The Table of Contents is workmanlike, and the list of precedents make for ease of reference. In the present edition, some 60 pages of new matter, and many new notes, have been added which, in addition to the complete revision which has taken place, bring the work up to date, *i.e.*, down to the end of February, 1909. Nearly 500 new cases have been added, making a total of cases employed some 1750. The new notes comprise such important matters as the Statutes of Limitations, as they regard mines, and the effect on the contract of the vendor or purchaser being of unsound mind. The four Appendices include a copy of the common form conditions used and settled by the Birmingham Law Society, together with a copy of the common form conditions used and settled by the Manchester Incorporated Law Association. The reader is, however, warned that the copyright in these forms is claimed by those bodies and must not be used without their permission. The Index is a model of what that important part of a book should be like. We feel certain that the present edition, maintaining as it does, an exceptionally high standard, will commend itself to the legal profession.

Second Edition. *The Indian Contract Act.* By SIR F. POLLOCK, Bart., D.C.L., LL.D., assisted by D. F. MULLA, M.A., LL.B. London: Sweet & Maxwell. 1909.

A book of this nature presents considerable difficulty of review. An English lawyer is not in the position to criticise a treatise on a system of law with which he is unfamiliar, and drawn to fulfil conditions of life beyond his ken. Of one thing he can be certain, and that is, of the fact, that anything issuing from the skilled pen of Sir Frederick Pollock will commend itself to the favourable consideration of lawyers practising under many various systems of law. Whether the learned author's strictures, on the length of time which has elapsed since the passing of this codifying Act without amendment, are justified it is hard to say, but one can imagine that men and matters alter considerably during 37 years. The revision of the parts dealing with Sale and Agency has been given over to such known experts as Mr. J. B. Eames and Mr. William Bowstead, and it would be hard to find writers better qualified for the work. Mr. Mulla has again undertaken the task of compiling and digesting the Indian decisions, and by reason of his high position it is allowable to assume that he has acquitted himself adequately.

References have now been added to the unofficial reports commonly cited in British Indian Courts; and knowing how completely these reports are compiled in many countries, it is fair to expect that the same degree of care is exercised in India. Practitioners in Indian Courts and in the Privy Council will welcome this new edition of a standard work.

Third Edition. *Mackenzie and Lushington's Registration Manual.* By S. G. LUSHINGTON, M.A., B.C.L., and C. G. E. FLETCHER. London: Butterworth & Co. 1909.

In the preparation of the third edition of this valuable manual, Mr. Lushington has had the assistance of Mr. Fletcher, the deputy town clerk of Bethnal Green. The Authors do not appear to have materially altered the form of the text, but have contented themselves with bringing the second edition thoroughly up to date. As before, the subject is divided under two heads, Part I deals with "Qualification of Electors," whereas Part II bears upon the subject of "Registration." Since the appearance of the last edition several important Acts have been passed, including the London Government Act 1899, the London County Council Electors' Qualification Act 1900, and the City of London (Union of Parishes) Act 1907, all of which have been incorporated in the text. It is unfortunate that the present edition anticipates the London Elections Bill just now being considered by Parliament, and which, if passed, will make such radical alterations in the law of Registration as affecting London. This was however unavoidable, unless the learned Authors had possessed a prescience not given to mortal man. The present edition is thoroughly well done, and Mr. Lushington's name is itself a sufficient guarantee for accuracy and profundity of research.

Sixth and Seventh Editions. *Company Law.* By Sir F. BEAUFORT PALMER. London: Stevens & Sons. 1909.

It is not often that we are able to include two editions of a work in one notice, but the sixth edition having been disposed of in a few weeks the Author has been able to bring out a new edition with great promptitude, including a few additions and alterations. The law as to the very large number of companies incorporated under the Companies Acts, now consolidated by the Act of 1908, is to be found in that Act "interpreted and supplemented by the many im-

portant decisions of the Courts on the Companies Acts 1862 to 1907," and supplemented by Insurance Company Acts, and in the opinion of the learned Author the whole forms "a comprehensive, and in most respects, admirable system of law for regulating the constitution, management, and winding-up of companies throughout the United Kingdom." The aim of the Author throughout has been to make his work useful, not only to lawyers, but also to business men, "for now-a-days . . . . . there are but few business men who can safely avoid the task of acquiring some knowledge of Company law." The few amendments in the Act of 1908 are pointed out, and relying on the rule laid down by Lord Herschell in *Bank of England* v. *Vagliano*, the decisions on the prior Companies Acts are largely used to interpret and throw light on the Act of 1908. Sir Francis Palmer is perhaps the greatest authority on Company law, and his opinion on doubtful points is of great value and interest. In the last edition 1905 we noticed several cases of which he disapproved, and we find that his disapproval of the decision in *Anglo-Exploration* has been confirmed by the House of Lords. That tribunal has not, however, carried out Sir Francis's desire by reversing the decision of the Court of Appeal in *Ruben* v. *Great Fingall Consolidated*, but on the contrary affirmed it without calling on Counsel for the Respondents.

Seventh Edition. *Hood and Challis' Conveyancing, Settled Land and Trustee Acts.* By F. WHEELER, M.A., B.C.L., assisted by J. I. STIRLING, M.A. London: Stevens & Sons. 1909.

This edition, which has been prepared by the same gentleman as the sixth edition issued in 1901, contains a large number of decisions which have been given on the important Acts which form the subject of this treatise. More than two hundred of such decisions have, we believe, been added to the present volume. On the other hand, there has been but little alteration of the law by statute. The only statute that the Authors have added to the body of the work is the Married Woman's Property Act 1907, which consists of only four sections, and the main effect of which is to get rid of the decision in *In re Harkness and Alsop*, and enables a married woman trustee to dispose of the trust property without the concurrence of her husband. It is curious to notice that the Act speaks of a "*femme sole*," but, as the note remarks, "the Court will not allow the usefulness of the section to be affected by a blunder in

orthography." Reference is made to the Married Woman's Property Act 1908, which makes a married woman liable for the maintenance of her parents. In Appendix II will be found certain sections of the Agricultural Holdings Act 1908, and the Small Holdings and Allotments Act 1908, which relate to charges, application of capital, and grants, leases, &c., of settled land to a county council for the purposes of small holdings. We have noticed several additional cases on the subject of improvements authorised under the Settled Land Acts and on Trustees investments.

Eighth Edition. *Mayne on Damages.* By His Honour Judge LUMLEY SMITH, K.C. London: Stevens & Haynes. 1909.

For over fifty years *Mayne on Damages* has been the leading English authority on its subject, and since 1872 Judge Lumley Smith has been connected with the editorship of it. He is solely responsible for the present edition. A considerable number of cases on the subject have been decided since 1903, and they will all, we believe, be found in the present edition. Some of them are of considerable importance, notably *Colls* v. *Home and Colonial Stores*, which settles the law regarding ancient lights, and *Watt* v. *Watt* which over-rules *Belt* v. *Lawes*, and lays down a very important rule of practice. Apart from the new cases, we have not noticed any important additions or alterations in the present edition, but it remains a trustworthy exponent of the law on an important practical subject.

Eighth Edition. *Emden's Winding-up of Companies and Reconstruction.* By HENRY JOHNSTON. London: Butterworth & Co. 1909.

The Company Act of 1907, and the subsequent consolidation of all the Companies Acts by the Companies (Consolidation) Act 1908, necessitated the issue of a new edition of this work. The Author carefully distinguishes between a codification and a consolidation of the law. The Act of 1908 being the latter, he points out that "knowledge of the previously existing law, as established by statutory enactments and reported decisions, is, in this case, essential." He, therefore, freely refers to the former Acts and decisions with much effect. The book is in a very convenient form for a practitioner, being of a handy size, and yet containing all that he is likely to want. We may call attention to the clever

summary of Cases as to Agreement to become a Member, and the Table showing where the sections of the previous Companies Acts are re-enacted in the Act of 1908. In the Appendices will be found a large number of forms, the text of the Limited Partnerships Act 1907, and the Companies (Consolidated) Act 1908, and Rules, Orders and Regulations.

Thirtieth Edition. *Handbook on Joint Stock Companies.* By F. GORE-BROWNE, M.A., K.C., and WILLIAM JORDAN. London: Jordan & Sons. 1909.

The Companies (Consolidation) Act 1908. By D. G. HEMMANT, London: Jordan & Sons. 1909.

Third Edition. *A. B. C. Guide to the Companies (Consolidation) Act 1908.* By H. W. JORDAN. London: Jordan & Sons. 1909.

Eleventh Edition. *A Summary of the Law of Companies.* By T. EUSTACE SMITH. London: Stevens & Haynes. 1909.

The Companies (Consolidation) Act 1908 (8 Edward VII., c. 69), although consolidating the law relating to Companies, has in fact altered the law, as it stood, to a very slight degree. Consisting of two hundred and ninety-six sections, it now forms one statute of easy reference in all matters affecting Company law. To lawyers trained under the system of the old seventeen statutes, the new names and sections will be difficult to assimilate all at once. New consolidating statutes require new editions of standard works, and bring into being many new books. Messrs. Gore-Browne and Jordan's widely-known handbook blossoms forth into its thirtieth and extensively revised edition. Its merits are too well known to need commendation. The twenty-ninth edition was issued as recently as October of last year, so that there has been little time for new decisions. However, one of special importance has been added, namely, *The Consolidated South Rand Mines*, L. R. [1909], 1 Ch. 491. *Salmon* v. *Quin and Axtens*, which was reported in the same volume at page 311, has now been affirmed by the House of Lords. As before, Mr. Gore-Browne is responsible for the legal portions of the book, and Mr. Jordan brings his wide experience to bear upon the details relating to the current practice of the Registrar of Companies and the Commissioners of Inland Revenue.

Mr. Hemmant has with great care annotated the new Statute, and his wide knowledge as a company lawyer is apparent in all

that he has written. He brings into full relief the slight changes in the law made by the Joint Committee of both Houses to whom the Bill was referred. This book should be useful both to the layman and the lawyer.

The third edition of the *A. B. C. Guide* has been considerably amplified, and some useful "Reminders for Secretaries" added as an Appendix. This work was originally compiled for laymen, and as a reliable guide for Directors, Secretaries and other Company Officials. We see, however, that the Author congratulates himself upon the fact that it has met with considerable success in the ranks of the Legal Profession.

Mr. Eustace Smith is well known, not only on account of his *Summary of the Law Companies*, but as a writer in other branches of law, such as Admiralty and Ecclesiastical Practice. As he states in the Preface, the new Act has called forth the eleventh edition, and it is to be hoped that the same success will be met with in this as in the former editions.

Forty-first Edition. *Stone's Justices' Manual.* Edited by J. R. ROBERTS. London: Butterworth & Co. 1909.

The present edition of *Stone* is a very important one, as no less than twenty-eight of the statutes passed in 1908 have required notice. Some of these have been very important and complicated, such as the Children Act, the Prevention of Crime Act, etc. The first of these specially affects Justices, and in addition they, or their clerks, will have to consider and interpret as best they can the Costs in Criminal Cases Act, in the opinion of Mr. Roberts "an ill-drawn and complicated measure, exceedingly difficult to interpret." Of the cases decided in the year, *Ex parte Bottomley* will be fresh in everybody's recollection, whatever opinion may be formed of the merits of that decision. *Harriman* v. *Harriman* decides the point on which Bucknill, J., and Gorell Barnes, P., differed in *Failes* v. *Failes* and *Dodd* v. *Dodd* respectively, in favour of the view expressed in the latter case. A case of considerable practical importance is *Burton* v. *Nicholson*, as it has, it is understood, had the effect of causing the Local Government Board to rescind two paragraphs of the Motor Cars Order 1904. We may point out in connection with the reference to this case that it is erroneously dated 1904 in the Table of Cases. It would hardly be worth pointing out if an error were not so rare in this well-edited work. Instead of

commenting on the value of this standard work, we think it better to give a much weightier testimony to its value, namely, that of the present Lord Chief Justice, who in the very recent case of *R.* v. *Thompson and others*, in quoting from the present edition, describes it as "a book of great authority."

The Law of Private Railway Sidings and Private Traders' Traffic. By J. H. COCKBURN. London: Stevens & Sons. 1909.—Mr. Cockburn has, we think, touched virgin ground in his choice of a subject. The law affecting it, is, however, of some importance and will be of interest to many. The Author states that "siding" and "branch railway" are in his work interchangeable terms; and that the subject-matter of his book is sidings or branch railways not belonging to railway companies but owned, held or controlled by traders, landowners and persons corporate or incorporate, not constituting a railway company. It also deals with traffic to and from private sidings, and of the service, rates and charges connected with these. The book is divided into three Parts:—Part I treating of Private Railway Sidings; Part II of Private Traders' Traffic; while in Part III are chapters on Private Owners' Wagons, Agreements as to sidings and traffic, and the Railway and Canal Commissioners. The relevant cases appear to be included, but the Table of Cases would be more useful were the references given.

The Law affecting Dogs and their Owners. By W. M. FREEMAN. London: Jordan & Sons. 1909.—It was recently recorded that an offer of £5,000 had been refused for a Pekinese dog; and other signs are not wanting that dog-breeding has become an industry of considerable importance. There is ample justification, therefore, for the publication of a book on the law affecting dogs by one who has clearly the requisite technical knowledge. As the Author observes, many branches of the law are involved, but he has confined his treatment of them within the limits of his subject. As far as we can judge, every question that can arise in connection with dogs is dealt with. There are chapters on the functions of the Kennel Club, Warranties, Dog Stealing, Rabies, the Game Laws, Licences, Cruelty to Animals and Shows. Appendices are given with the Kennel Club Rules, the Dogs Act 1906, the Dogs Act 1871, &c. The book is unquestionably useful, not only to breeders, but to the legal profession, and we feel therefore less hesitation in criticising

two points. The first of these is the rather loose style which, pardonable perhaps in articles in a weekly paper, might have been corrected when the articles attained the dignity of a text-book. Our second criticism is that the Author does not sufficiently quote the authorities.

The Small Holdings and Allotments Act 1908. By A. J. SPENCER. London: Stevens & Sons. 1909.—This consolidated Act has already produced several text-books. The one under notice seems thoroughly adequate. The Act is divided into three parts—(1) Small Holdings; (2) Allotments; (3) General Provisions. This order the author has retained, setting out the sections with excellent notes underneath. In a short Introduction a good epitome of the Act is given. Appendices with Rules, Circular Letters, &c., and a sufficient Table of Cases, together with an Index, complete a text-book which no doubt will prove serviceable.

Restrictive Covenants Affecting Land. By W. A. JOLLY, M.A. London: Stevens & Sons. 1909.—This seems a useful little book. The Author grounds his work on the doctrine in *Tulk* v. *Moxhay*, and in the chapters following deals with such matters as Personal and Collateral Covenants; Deeds of Mutual Covenants in Leases; Construction of and Restrictions for enforcing Restrictive Covenants. There is not a very great deal of recent Case law in this branch of law, but such as exists (and we may quote *Nalder & Collyer's Brewery Company* v. *Harman* as an important example) will be found adequately treated. The Tables of Cases and Statutes, and the Index are all well done.

The Hague Peace Conferences of 1899 and 1907. 2 Vols. By J. B. SCOTT. Baltimore: The Johns Hopkins Press. 1909.—This *compte rendu* of the work of the Hague Conferences is from the pen of the United States Technical Delegate to the gathering of 1907. Written in a popular and fluent style, Vol. I makes attractive reading, and the eminence of its compiler is a guarantee of the reliable character of its matter. Vol. II contains official documents, and is a very complete collection, including the U. S. Instructions and Official Reports, as well as all the Conventions and Resolutions of the Conferences of 1899 and 1907. The book may be confidently recommended, particularly to those who wish to get a little behind the scenes of the Hague history.

Criminal Types in Shakespeare. By A. GOLL. Translated from the Danish by Mrs. C. WEEKES. London: Methuen & Co. 1909.—This is a study of certain of the criminals portrayed by Shakespeare, and is mainly for the benefit of criminal psychologists who may, from a study of such "supreme searchers of psychology" as Shakespeare, gain light towards understanding the criminal mind. The types selected are (1) Brutus and Cassius—both are political criminals, but the former was an idealist, the latter a "prosaist" influenced by personal hatred; (2) Macbeth—a wonderful study of suggestion; (3) Lady Macbeth—a study of the female criminal; (4) Richard III—"the criminal by instinct, whose nature is greed"; (5) Iago—"the criminal by instinct, whose motive is the lust of destruction." All these studies are worked out with great subtlety and ability. We cannot say whether they help towards combating crime, but they are very interesting and suggestive studies of Shakespeare and human nature.

On the Oxford Circuit. By the Honble. Mr. Justice DARLING. London: Smith, Elder & Co. 1909.—Some of these verses have appeared before in various periodicals but are now published in a somewhat different form with some others. The most important piece is the one that gives its name to the collection. "On the Oxford Circuit" is written in hexameters and has some tragic touches amongst its gaiety, ending as it does with the allusion to the sudden death of Mr. Justice Talfourd on Circuit. The rest of the volume is made up of thirteen Sonnets and some Occasional Verses. They are light, with some happy allusions and turns of speech.

Leaves of the Lower Branch. By E. B. V. CHRISTIAN, LL.B. London: Smith, Elder & Co. 1909.—The sub-title of this book, "The Attorney in Life and Letters," foreshadows its contents. It is mostly devoted to an account of the Attorneys in fiction, with many humourous remonstrances against the blackness of the portraiture, and an account of the literary performances of Attorneys. The first essay is a humourous attempt to vindicate Messrs. Dodson and Fogg against the strictures cast on them by Mr. Pickwick. The three principal novels of the law, *Bleak House*, *Ten Thousand a Year*, and *Orley Farm* are treated at some length, and kindly reference is made to Sir Walter Besant's *The Ivory Gate*. The

whole is written in a pleasant and lively style, shows wide literary knowledge, and well repays perusal.

The Pharmacy Acts 1851—1908. By HUGH H. L. BELLOT, M.A., D.C.L. London: Jesse Boot. 1909,—A "Foreword," in the shape of a blessing on the latest Pharmacy Act, by the Chairman of the Chemists' Association, strikes us as an odd beginning to a legal treatise, whose function should be to expound rather than to enlarge upon the merit of legislation. The book itself is quite meritorious. In turn the Author deals with the Arsenic Act 1851, the Pharmacy Acts of 1852, 1868, 1869, and 1898, and the Poisons and Pharmacy Act 1908. The sections are set out with sufficient notes. Chapter IV gives an interesting account of the circumstances which led up to the Act of 1908, including the recommendations of he Departmental Committee of 1903, and various Private Bills which failed. There is a good Index, but the Table of Cases would be improved by the addition of references. An Appendix gives a report of *The Pharmaceutical Society* v. *The London and Provincial Supply Association Ltd.*

Encyclopædia of Forms and Precedents. Vol. XVII. General Index. By JOHN CHADWICK, M.A., LL.B., assisted by WALTER S. SCOTT. London: Butterworth & Co. 1909.—This important Encyclopædia is at last completed by this not least important volume of the series. The Index cover 750 pages and is compiled with the care which has all through characterised the production of the work. We must again congratulate Mr. Underhill and his colleagues at having reached the successful conclusion of their labours. This volume contains a few *Corrigenda* and *Addenda*, in one of which the General Editor, rather against the grain, suggests the insertion of certain words in a form of appointment given in the sixth volume, although he has been "quite unable to follow" the objection to the form given. The *Corrigenda* and *Addenda* in this volume are few, because each volume has included such references to previous volumes as the work proceeded.

An Analysis of Smith's Principles of Equity. By the Author, H. A. SMITH, M.A., LL.B. London: Stevens & Sons. 1909.—Mr. Smith's parent work is well known, and we think he has done

well to produce an analysis. This will be of considerable assistance to students. The style is clear, the matter is good, and the book is not overburdened with references.

Fourth Edition. *Thomas' Leading Cases in Constitutional Law.* By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1908.—This new edition does not contain any additional leading cases, but a certain number of new cases such as *R.* v. *Lynch* and *Ex parte Marais* are noted. The cases seem well selected for the use of students, are very shortly and clearly put, with sufficient notes and citations to give such information as may be required. We have noticed what looks like a slip in Note VI, "On the liability of Governors and Viceroys." After citing *R.* v. *Eyre*, the sentence goes on to say, "and it has since been held that the above-mentioned statutes apply only to mis-demeanours and not to felonies." The case cited in support of this is *R.* v. *Shawe*, which was decided in 1816, whereas *R.* v. *Eyre* was decided in 1868.

Eleventh Edition, *Redgrave's Factory Acts.* By C. F. LLOYD. London: Butterworth & Co. 1909.—Since the last edition of this valuable work, The Factory and Workshop Act 1907, the Notice of Accidents Act 1906, and the Employment of Women Act 1907, have become law: and there have been further Regulations for Dangerous Trades, and Special Orders. Therefore a new edition is clearly justified. The book is so well known that little description of its contents is required. An admirable historical sketch is given in the Introduction, showing the course of legislation from the Act of 1802 to the consolidating Factory and Workshop Act of 1878, and the later consolidating Act of 1901. The Introduction further deals with the Effect of Factory Legislation, the workpeople to whom the Act applies, and epitomises the Act of 1901 and the subsequent legislation. The *corpus* of the book sets out the text of the various Acts with very full and good notes, and the latest Case law. The latest regulations are included. The Table of Cases and Index leave nothing to be desired, and altogether the book is a most excellent production.

Forty-sixth Edition. *Every Man's Own Lawyer.* By a Barrister. London: Crosby Lockwood & Son. 1909.—Owing to the immense amount of important legislation during the year 1908,

a most extensive revision of this book has been rendered necessary. To mention only a few statutes, such as the Old Age Pensions Act, the Coal Mines Regulation Act, and the Agricultural Holdings Act, it will be apparent how much revision will be required in order to incorporate them into all parts of the text. Many people wax humorous when discussing the merits of *Every Man's Own Lawyer*, and one often hears it described as the "lawyer's friend"; but of one thing there is no doubt, and that is, it gives in a handy form, without technicalities, the law applicable to the petty details of daily life. Regarded from that standpoint, it undoubtedly tells the worried householder, doubtful business man, or the tax-payer, a dozen little things he does not think it worth while consulting his solicitor about and otherwise leaves to chance. How many a man who has not thought it worth while seeking expert advice has found himself landed in heavy loss! Whether he will get the equivalent by consulting this work is a moot point; but he will, by doing so, often be warned that there is a pitfall in front of him, the presence of which must not be disregarded.

CONTEMPORARY FOREIGN LITERATURE.

Étude sur le Premier Ministre en Angleterre. By Dr. MARCEL SIBERT. Paris: 1909.

This most original and valuable study traces the evolution of the office of Prime Minister from Clarendon to Mr. Asquith. The earliest approach to the name appears to be the "prime man" of "Henry VIII," Act III, sc. 2. The phrase "prime minister" is, as far as Dr. Sibert's researches have led him, first used in *Colbatch's Account of the Court of Portugal* (1700). It is only quite recently that the title has obtained recognition *eo nomine* with a definite rank in political precedence. Dr. Sibert favours the referendum as a means of determining questions of a certain kind, but he does not mention its adoption by Parliament in the schedule to the Commonwealth of Australia Act. A comparison with the position of the Prime Ministers of France, Italy and Belgium is instructive. The bibliography is excellent.

PERIODICALS.

Journal du Droit International Privé. Nos. V, VI. Paris: 1909.—The legal effects of the Messina earthquake are treated at p. 697. They are chiefly *moratorium* in contracts and rules of evidence where documents had been destroyed. Mr. E. J. Schuster compares the English and German law of cheques. The latter system ignores crossed cheques, allowing only the somewhat cumbrous alternative of writing on the instrument *Nur Zur Verechnung* (p. 709). France will not admit the levirate in an alleged marriage of Tunisian Jews (p. 757). Brazil knows both the phrase and the remedy of *habeas corpus* (p. 832). Denmark does not directly give effect to foreign judgments, except those of Swedish Courts under a treaty of 1861. But the same result is practically obtained by the party entitled to the advantage of the judgment bringing an action not on the judgment but on the original cause of action and giving the judgment in evidence.

Zeitschrift für Internationales Privat- und Öffentliches Recht. Vol. XIX, parts 1—3. Leipsic: 1909.—The most interesting articles are on limitation of actions in the United States and on pacific blockade (*Friedens-blockade*) by Dr. Falcke of Barcelona. To the latter is appended an exhaustive bibliography, beginning with a rare South American work, *Los cinco errores capitales de la intervencion anglo-francesca en la Plata* (Montevideo: 1849). There is a review of a work on Criminal law by a judge bearing the historic name of Mendelssohn-Bartholdy, of Wurzburg.

Deutsche Juristen-Zeitung. 1 April—15 June. Berlin: 1909.—Roman law is recalled by the additions to the Code being called *Novellen* (p. 597). Rectification of a will by the Court, impossible in England, seems according to one view possible in Germany (p. 426). The name of Dr. Mendelssohn-Bartholdy appears again as the writer of an article advocating reform in the English bankruptcy law, with special reference to the Report of the Board of Trade Committee of last year.

La Giustizia Penale. 18 March—10 June. Rome: 1909.—Where a dramatist writes and produces a play which is a *rappresentazzione abusiva* of a dead rival, the daughter of the deceased may

appear as *parte civile* (p 335) A man cannot be convicted of carrying a gun without a licence if there be no *mens rea* A conviction was therefore quashed on cassation where the gun had been used for shooting down a wolf which had seized a sheep belonging to the accused (p 371) One defendant cannot without the consent of his co defendants defer the oath to the prosecutor (p 404) There are several decisions on the special local law of *pascolo abusivo* in Sardinia

JAMES WILLIAMS

Books received, reviews of which have been held over owing to want of space *Leake on Property in Land*, Halsbury's *Laws of England*, *Vols VII & VIII* Anson's *Law and Custom of the Constitution* Ely and Aggs' *Agricultural Holdings* Ashburner's *The Rhodian Sea Law* *Clerk and Lindsell on Tort* Dobson's *Death Duties* *Annual Statutes*, *1908*, Lawes' *Law of Compensation for Industrial Diseases* Tomlin and Uthwatt's *Supplement to Lindley on Partnership* Freeman's *Guide to Solicitors' County Court Costs*

Other publications received —Hodgins' *Prerogative right of revoking Treaty Privileges* (Carswell Company, Toronto), *Briefs* (Waterlow & Sons), *Kime's International Law Directory, 1909* *Humane Review*, *Reports of the American Bar Association*, *Vol 33*, Beven's *The House of Lords on the Law of Trespass* *Butterworths Quarterly Digest* Bryan's *Development of English Law of Conspiracy* (Johns Hopkins Press, Baltimore)

The *Law Magazine and Review* receives or exchanges with the following amongst other publications —*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace* *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*

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